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In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANK B. JAMES, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Questions Presented

1. Did the First Circuit err by holding that, irrespective of the federal Constitution and federal sovereignty, Massachusetts, as one of the 13 original States, working through its general police powers and so-called fee title to Indian lands within its borders, can unilaterally terminate a federal Indian tribe, emancipate tribal members from federal guardianship, release tribal land from federal alienation restriction, extinguish Indian title and convert a federal tribe into a state municipality?

2. Did the First Circuit err by holding that individual Indians, relying on federal Indian common law, the Constitution and the Indian Nonintercourse Act, do not have standing for themselves, their class or their tribe, to seek a declaration of tribal status as a foundation for declarations of their derivative rights to commons in tribal lands, hunting, fishing and other tribal assets?

3. Did the First Circuit err by upholding the district court's unreasoned denial of petitioners' motion to amend their complaint?

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FRANK B. JAMES, ET AL.
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JAMES G. WATT, ET AL.*
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

Petitioners Frank B. James et al. pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit entered in this case on August 24, 1983.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is docketed as No. 83-1026, *Frank B. James, et al. v. James G. Watt, et al.*, *see* App. A. The opinion of the District Court for the District of Massachusetts is docketed as Civil Action No. 81-3204-Mc. *See* App. B.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on August 24, 1983. This petition was filed within ninety days thereof. This Court has jurisdic-

* See List of Parties, Appendix C.

tion under 28 U.S.C. § 1254(1) and under Sup. Ct. R. 17.

Constitutional and Statutory Provisions Involved

"The Congress shall have the power . . . to regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. 1, § 8 cl. 3.

"No state shall enter into any treaty. . . ." U.S. Const. Art. 1, § 10, cl. 1.

"He [the President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties. . . ." U.S. Const. Art. II, § 2, cl. 2.

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

"No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

Statement of the Case

The original proceeding is an action by 102 petitioners on behalf of themselves and all members-descendants of the Gay Head Tribe against 14 federal, state and private defendants, essentially seeking declarations as to tribal and reservation status, and declarations of petitioners' rights to commons therein. For a copy of the complaint see Special Submission filed herewith, (Appendix D-1). District Court jurisdiction was based on the Commerce and Treaty clauses of the United States Constitution; the federal common law; 5 U.S.C. § 701 *et seq.*; 25 U.S.C. § 177; and 28 U.S.C. §§ 1331, 1337, 1343, 1362.

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit affirming dismissal for lack of standing under the Indian Nonintercourse Act (25 U.S.C. § 177) and holding Massachusetts may extinguish Indian title without federal consent.

The gist of petitioners' allegations is there has been continuous Aquinnah (now Gay Head) Indian occupation of their 3400 acre Reservation now known as the Town of Gay Head for approximately 4,000 years; that the Gay Head Tribe and their Reservation have been under the control of three successive sovereigns — the English Crown from about 1620 to 1781, the Commonwealth of Massachusetts from 1781 to 1789 and the United States of America from 1789 to the present time.

Although since about 1701, Indian title in Massachusetts could not be extinguished without central sovereign consent, and although both the Gay Head Tribe and the Gay Head Reservation were recognized in various official Federal and State reports during the 19th century, (App. D), by 1869 and 1870 Acts of the Massachusetts Legislature and without federal consent, the Gay Head Indians were purportedly stripped of their Indian status and emancipated from federal guardianship, the federal alienation restriction on their Reservation lands was purportedly released, State judicial allotment of their Reservation was purportedly authorized, and their federal Tribe was purportedly converted into a Massachusetts town, transferring thereto all tribal governing powers and assets, including land, funds, hunting and fishing rights and the like.

Pursuant to this federally unauthorized legislation, various judicial partitions have been made, various deeds granted, and a number of non-Indians have intruded onto the Gay Head Reservation.

Because the Gay Headers' tribal powers and assets had been usurped, they were a 'dispossessed tribe' with no legitimate governing body. But in 1974 a group of tribal members who

had formed the Wampanoag Tribal Council of Gay Head, Inc., a Massachusetts corporation, brought *Gay Head I*, an action now pending in the federal district court in Boston (CA No. 74-5826-Mc). This suit seeks return of only 230 acres of the Tribe's 3400 acre Reservation and none of its commons in fishing, hunting, beaches and the like. In 1981, the so-called Tribal Council, apparently following the lead of the Gay Head Taxpayers Association, a non-Indian group who had intervened in the suit, proposed a settlement which essentially preserved the status quo, in exchange for most limited tribal control over 230 acres of so-called common lands (the poorest land in the reservation) with possible limited use of an additional 175 acres now in federal bankruptcy court, a full release of all tribal claims in the remaining 3000 acres of the Reservation and all tribal commons in funds, fishing, hunting, trapping, beaches, shores, water, cliffs, burial grounds, monuments and the like, with accession to state and local control in all essential particulars.

Convinced the proposed settlement was essentially a sellout to the non-Indian interests not in the best interests of the Gay Head Tribe and its members, instant petitioners felt they had as much right to press their views within 'a dispossessed tribe' as the rival group behind *Gay Head I*. So in December 1981, petitioners filed instant suit claiming the Tribe's entire cause of action, both individually and as a class representing all members-descendants, joining all interested parties and seeking declarations as to tribal status and member rights in the *entire* 3400 acre Gay Head Reservation and *all* its appurtenant commons.

On December 17, 1982, without reasoned opinion, the district court dismissed petitioners' complaint for lack of standing, citing the need for tribal action and apparently not considering their class claim tribally representative. (App. B).

Three days later, petitioners moved to amend by rearranging and expanding the parties, thereby naming the Gay Head Tribe, the Wampanoag Nation and Ellsworth Oakley (Wam-

panoag Supreme Sachem) as plaintiffs. The district court denied without reason.

Reasons for Granting the Writ

Petitioners contend two Acts of the Massachusetts legislature in 1869 and 1870, passed without federal consent, violate the federal policy of absolute control over extinguishing Indian title.

The first, an Enfranchising Act, declares "all people... heretofore known as and called Indians" to be "citizens of the Commonwealth", with "all the rights, privileges and immunities", but, "subject to all the duties and liabilities of other citizens". Then, "all Indians" were empowered "to take, convey and transmit...all lands heretofore known as Indian lands", and probate judges were empowered to "partition" or "sell" Indian lands held in common. *See* Mass. Acts 1869, c. 463.

The second, an Incorporating Act, "abolished" the Gay Head Tribe, incorporated it as a Massachusetts town, transferred all Gay Head tribal powers, lands, funds, fishing and other rights to the town, made Gay Head part of certain state and federal political districts, and empowered superior court judges to "partition" or "sell" parts of the Gay Head Reservation. *See* Mass. Acts 1870, c. 213.

The First Circuit defends these two Massachusetts Acts with an unusual construct.

Styling Justice White's *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) affirmance of Chief Justice Marshall's "strong pre-emptive interpretation of the Indian Commerce Clause" as "dicta" and not in line with "modern Indian law", the First Circuit challenges the proposition that the federal government has absolute control over extinguishing Indian title as an attribute of national sovereignty.

Reasoning that federal power over Indians and Indian lands does not work directly through federal sovereignty or the federal constitution but only through Congress' exercise

of its exclusive Indian power under the Indian Commerce Clause, the First Circuit contends Congress' 1834 modified Nonintercourse Act (25 U.S.C. § 177) discloses a federal interest in controlling *tribal* transactions in tribal land but *no* federal interest in controlling transactions in tribal land by members of those tribes, thereby leaving such individual Indian transactions open to state regulation.

On that basis, the First Circuit argues that in an area clearly outside any expressed federal interest and preemption and by having made its Indians citizens, Massachusetts "has a valid interest in maintaining the stability of land transactions entered into according to its law, in treating all its citizens equally, and in providing the same property rights to all its citizens." App. A10. So, the First Circuit continues, Massachusetts was justified in *giving* individual Indians fee title and the power to alienate land" as an effort "to *convey* the state's fee title to them and thereby grant them their lands in fee simple absolute." App. A7. In fact, the First Circuit concludes, this post-1789 legislation was "not [an effort] to *take* rights *from* the Indians", but rather "Massachusetts' own attempt to undo its earlier cases and statutes limiting the rights of Indians in their aboriginal lands to possessory title and invalidating conveyances of that title." App. A7-8. (Emphasis in original).

I. The Decision Below Directly Conflicts With This Court's Continuous Assertion of Absolute Federal Control Over Extinguishing Indian Title in Its *Johnson v. McIntosh*; *Worcester v. Georgia*; *Cherokee Nation v. Georgia*; *United States v. Santa Fe Pacific R. Co.*; *Oneida Indian Nation v. County of Oneida* and *Wilson v. Omaha Indian Tribe* Decisions.

The First Circuit's argument 194 years after Union that working through its general police power and pre-Union fee

title, Massachusetts can disregard federal supremacy and do as it will with Indians and Indian lands within its borders, is a startling throwback to pre-Civil War states-rights arguments flatly rejected by this Court in its formative years. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 519 (1832). These cases emphatically established absolute federal supremacy over Indians and Indian lands in the 13 original States regardless of whether or not the States were deemed to have retained their pre-Union right of soil, fee title or right of preemption from their former sovereignty. And an unbroken line of post-Civil War opinions by this Court down to 1974 and 1979 affirm this seminal proposition without change. *See, Oneida Indian Nation v. County of Oneida, supra; Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979); *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941).

That the central sovereign has absolute control and final say over Indian land transactions anywhere in the United States has been a settled part of North American Indian law since at least 1763.

A brief review of the history of English North American settlement demonstrates this proposition.

By agreement rooted in the discovery of North America in the late 1400s, England, with other interested European nations capable of mounting sea expeditions to 'discover' and 'claim' parts of the new continent, established the principle that the 'discoverer' would have exclusive right to the soil subject to the occupation of the natives, including the exclusive right to acquire the soil from them and establish settlements thereon.

Pursuant to this principle, large territories of North America were 'discovered' and 'claimed' in the name of the English King, who starting in 1606, eventually consummated

his claims by granting settlement rights to various companies including his 1628 Massachusetts Bay Colony Charter to the Rosewell group.

This charter, in 'absolute property' and with 'power of government', empowered the Rosewell group "to have, take, possess and acquire any landes" and "to make laws...for the government and ordering the said landes...and the people inhabiting...the same...."

Over the next 150 years, English settlements established along the Atlantic seaboard resulted in the 13 original colonies including Massachusetts. And clearing the way for these settlements necessarily included acquiring Indian title in the Crown's name.

But continued and widespread abuse of this delegated Crown power to extinguish Indian title fomented so much trouble with the Indians over the years,[1] it finally came to crisis. To defuse the situation, King George III issued his 1763 proclamation withdrawing the power from local colonial control and reclaiming it for the Crown, thereby establishing

[1] For example, right here in Massachusetts, in 1748 many of the Mashpees (a Wampanoag Tribe on Cape Cod) were deeply upset over efforts of certain non-Indians, under Massachusetts Bay Colony authority, to get their hands on some of the Mashpees' best land. Various petitions to the Royal Governor and the General Court seeking protection were of no avail. So in 1760, Reuben Cognehew, a Mohegan Indian who was teaching school on the Mashpee Reservation, took a personal interest and made his way by ship to England, got an audience with King George III, and personally presented the Mashpees' request for the King's protection. King George instructed his Royal Governor in Boston to look into the matter. Shortly thereafter, in 1763, the very year the King acceded to all Indian complaints from North America and issued his now famous Proclamation withdrawing local colonial power to extinguish Indian title, the Massachusetts General Court removed non-Indian overseers who had been trying to extinguish Indian title to choice parts of the Mashpee Reservation. Thus the personal intervention of the King restored full possessory rights to the Mashpees. *See* F. G. Hutchins, *Mashpee: The Story of Cape Cod's Indian Town (1979), pp. 73-74.*

the principle that from then on Indian lands could be alienated and Indian title extinguished only under central sovereign control:

> "And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do . . . strictly enjoin and require, that no private person do presume to make any purchase from said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but that if at any time any of the said Indians should be inclined to dispose of the said lands, *the same shall be purchased only for us, in our name*, at some public meeting or assembly of these said Indians, to be held for that purpose by the governor or commander in chief of our colony respectively within which they shall lie; and in case they shall lie within the limits of any proprietaries, *conformable to such directions and instructions as we* or they *shall think proper to give for that purpose*." By the KING, GEORGE, R., A PROCLAMATION, Given at the Court of St. James, 7 October 1763 (emphasis added).

Twenty years later, by the 1783 Paris peace treaty which confirmed Washington's 1781 victory over Cornwallis, Great Britain relinquished all claim "to territory and government of the United States", and ceded to the 13 new States the Crown's power of government and right of soil, including its exclusive power to extinguish Indian occupancy of land not yet detribalized or individualized.

And in 1789 when the United States became operable, the 13 original States' Crown power over Indian lands passed to the United States.[2]

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[2] The extent of state power over Indian affairs even during the Confederation period has been questioned. *See Oneida Indian Nation v. New York*, 691 F.2d 1070 (2nd Cir. 1982). However, this case does not raise the issue of pre-1789 state action.

Speaking for this Court in 1823, Chief Justice Marshall affirmed absolute central sovereign control over extinguishing Indian title:

> "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognized the absolute title of the crown to extinguish that right." *Johnson v. McIntosh, 21 U.S. (8 Wheat.) at 588.*

And speaking for this Court in 1974, Justice White re-affirmed the proposition:

> "That right [of occupancy in the Indian tribes], sometimes called Indian title and good against all but the sovereign, *could be terminated only by sovereign act.* Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands *became the exclusive province of the federal law. Indian title . . . was extinguishable only by the United States.*" *Oneida Indian Nation v. County of Oneida, supra,* 414 U.S. at 667 (emphasis added).

In other words, the very purpose of the Crown's 1763 withdrawal of delegated power to local government to extinguish Indian title was to stop local abuse of that power and to mitigate Indian dissatisfaction. Because "the people of the States where they are found are often their deadliest enemies", *United States v. Kagama,* 118 U.S. 375, 383 (1886), and because of "the loss of their lands . . . through overreaching by members of other races," *Alonzo v. United States,* 249 F.2d 189, 196 (10th Cir. 1957) cert. denied, 355 U.S. 940 (1958), the Indians were given special *federal* protection.

The very intensity of the opposition petitioners now meet in seeking a declaration of their rights, suggests the same hostility and the same need for central sovereign protection which produced the 1763 Proclamation are still at hand.

In any event, petitioners believe it is clear that absolute central sovereign control over extinguishing Indian title, reclaimed by King George in 1763 and passed to the 13 col-

onies in 1783, passed to the federal government as an attribute of national sovereignty when the United States became operable.

So petitioners believe the First Circuit's styling this Court's continued affirmance of the United States' absolute and exclusive right to extinguish Indian title as "dicta", to justify purported extinguishment of Indian title by Massachusetts, is fundamentally wrong.[3] Not only it denies this Court's supremacy, it denies petitioners a federal protection against local abuse and discrimination which has been theirs since at least 1763.

II. The Decision Below Directly Conflicts with this Court's Continuous Assertion of Exclusive Federal Control Over Emancipating Indians and Terminating Indian Tribes and Indian Reservations in Its *United States v. Rickert; United States v. Holliday; United States v. Nice* and *DeCouteau v. District County Court* Decisions.

In petitioners' view, Massachusetts' federally unauthorized 1869 assertion of jurisdiction over Indians and Indian lands within its borders by making the Indians citizens and giving them the right to freely alienate sections of tribal land inevitably had the de facto consequence of federally unapproved-emancipation, termination of tribe and reservation as well as extinguishing of Indian title.

As this Court has emphasized time and again, emancipating Indians and terminating Indian tribes as extinguishing Indian title are matters of *absolute federal control*. The need

[3] In order to justify its broad reading of State power over Indians and Indian lands, the First Circuit relies in part on *United States v. Franklin County*, 50 F.Supp. 152 (N.D.N.Y. 1943), App. A6, which has been overruled. *See Cayuga Indian Nation v. Cuomo*, 565 F.Supp. 1297, 1314-1315 (N.D.N.Y. 1983) and cases cited therein. The Court of Appeals also relies on "interest balancing" cases such as *New Mexico v. Mescalaro Apache Tribe*, 51 U.S.L.W. 4741 (U.S. June 13, 1983) which are inapposite – such an analysis has *never* been used where Indian *lands* are at issue.

for federal consent is a 'given' of federal Indian law. Trying to mask emancipation and termination as 'enfranchisement' is a device other states have tried without success:

> "It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine." *United States v. Rickert*, 188 U.S. 432, 445 (1903); *see also United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419-420 (1866).

Insulating Indians from local control in North America goes back over 200 years:

> "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973), *quoting Rice v. Olson*, 324 U.S. 786, 789 (1945).

And the same "frauds and abuses" that led to King George III's 1763 withdrawal of local control over extinguishing Indian title have prompted this Court to speak out in no uncertain terms. *See United States v. Kagama, supra; see also Alonzo v. United States, supra.*

Accordingly, it rests with Congress to determine the time and extent of emancipation, *United States v. Nice*, 241 U.S. 591, 598 (1916), and Congress has exclusive authority to terminate an Indian reservation. *DeCouteau v. District County Court*, 420 U.S. 425, 444 (1975). And absolute federal control over extinguishing Indian title is "rudimentary" and applies "in all of the States, including the original 13." *Oneida Indian Nation v. County of Oneida, supra*, 414 U.S. at 670.

A. *In Addition, The Decision Below Directly Conflicts With Like Assertion In Second And Fourth Circuit Decisions.*

Insofar as other Circuits are concerned, over in New York the federal courts have given short shrift to similar State attempts to interfere with Indians and Indian lands within their borders. Two excellent statements illustrate:

> "Accordingly it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms. Until such legislation by Congress, even a grant of citizenship does not terminate the tribal status or relieve the Indian from the guardianship of the government." *United States v. Boylan*, 265 F. 165, 171 (2nd Cir. 1920).
>
> "The reservation lands are held in common by the tribe, although individual members of the tribe may be in possession of a particular tract, and such possession is recognized by the tribe. But the lands are inalienable except with the concurrence and consent of the United States. An individual member of the tribe cannot convey title to any particular tract of reservation lands. . . . The Judicial sale by the referee and the referee's deed in the partition action ran counter to that principle and purported to convey title to reservation lands in fee simple. This is repugnant to governmental policy in regard to Indian reservations. If such sales are countenanced by the government there is a danger that in time the reservation will cease to exist as such. Congress has adopted a policy of continuing the tribal relations of Indians and their rights as distinct political communities, apart from state interference. *Congress alone may vary this policy. . . . Until such time as Congress sees fit to change it, any interference with it either by state legislation or by extension of the jurisdiction of the state courts over internal affairs of Indians on the reservation is an unlawful interference with a governmental function.*" *United States v. Charles*, 28 F.Supp. 346, 348-349 (W.D.N.Y. 1938). (Emphasis added).

And two equally excellent statements from the Fourth Circuit illustrate their view:

> "The action or assent of the United States is absolutely essential in order to enable the Indian tribes or bands, or individual members of the same, to renounce the dependent condition caused by the state of pupilage in which the Indians have been since the adoption of the federal constitution." *United States v. Boyd*, 83 F. 547, 553 (4th Cir. 1897).
>
> "[I]t is perfectly clear that an act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn." *Haile v. Saunooke*, 246 F.2d 293, 297-298 (4th Cir.), *cert. denied*, 355 U.S. 893 (1957).

So as petitioners see it, this Court made it clear in 1974, *see Oneida Indian Nation v. County of Oneida, supra*, that Indians and Indian lands in the 13 original States became as fully federalized in 1789 as the Tribes and their lands in the later admitted States. Accordingly, petitioners believe they, their Gay Head Reservation and their other tribal assets are entitled to the same federal judicial protection accorded their Indian brethren in the Second and Fourth Circuits — a protection this Court says covers all Indians and all Indian lands throughout the United States.

III. The Decision Below Directly Conflicts with this Court's Holding the 1834 Revision of the Indian Nonintercourse Act Releases Only Reserved Individual Parcels of Detribalized Treaty Land from Federal Alienation Restriction, in Its *Jones v. Meehan* Decision.

The First Circuit asserts "individual Indians [cannot] assert [Nonintercourse Act] rights on their own behalf", App. A3, because "the modified (1834) [Nonintercourse Act] in-

dicates that Congress consciously chose not [to supervise transactions involving individual Indians] but, rather, to limit its supervision . . . to transactions and lawsuits involving the tribes themselves." App. A10.

Despite petitioners calling the First Circuit's attention to this Court's exhaustive interpretation of Congress' 1834 deletion of "any Indian" from the Indian Trade and Intercourse Act in *Jones v. Meehan*, 175 U.S. 1 (1899), and despite petitioners' painstaking effort to demonstrate that Congress' 1834 revision dealt only with individual Indian transactions in *detribalized* treaty land — not with individual Indian transactions in *tribal* land, the First Circuit ignored both this Court's opinion and petitioners' briefing.

Congress' first Trade and Intercourse Act in 1790 (Act of July 22, 1790, ch. 33, section 4, 1 Stat. 138), a temporary measure, prohibited Indian land transactions "by any Indians or any tribe of Indians" without federal consent. The temporary reenactments in 1793, 1796 and 1799 and the first permanent enactment in 1802 were essentially the same, except the latter two (1799 and 1802) referred to "any Indian" in singular instead of plural.

But in 1834, Congress deleted the words, "any Indian" altogether:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Act of June 30, 1834, ch. 161., 4 Stat. 729.

And this version continues today (25 U.S.C. § 177).

In 1833, U.S. Attorney General Taney had ruled that reservations to individual Indians excepted from an 1832 Pottawatomie tribal cession to the United States by treaty, did not grant a full non-restricted fee to said individual Indians, thereby prohibiting alienation of their individual holdings without federal consent. 2 Ops. Atty. Gen. 587.

Presumably Congress felt the intent of the treaty reservations was otherwise, and wanted them honored. Hence the 1834 deletion. *Jones v. Meehan*, 175 U.S. at 12.

Commenting on the deletion, the Court suggested as Attorney General Garland had concluded 11 years earlier, 18 Ops. Atty. Gen. 486, that tribal land could no more be alienated by a member of a tribe than by the tribe itself.

Then Mr. Justice Gray went on:

> "But the inference appears to us to be irresistible that Congress did not intend that there should thenceforth be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States." 175 U.S. at 13.

In other words, the Court coupled the "cession reservation" in 1832, the "Taney opinion" in 1833, and the "Congressional deletion" in 1834 — and drew an "irresistible inference".

Then the Court concluded this Congressional intent was consistent with a series of Court opinions which held such "treaty reservations" converted the particular tribal holdings into individual property in full fee, free of alienation restriction:

> "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, *the treaty itself converts the reserved sections into individual property; the reservation,* unless accompanied by words limiting its effect, *is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure,* unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation." 175 U.S. at 21 (emphasis added).

In other words, such "full fee" treaty reservations are put on a par with special Acts of Congress and Executive patents, as a mode for granting unrestricted individual holdings of detribalized Indian land.

As petitioners explained to the First Circuit:

> "We think it most important to again emphasize Mr. Justice Gray's careful explanation in *Jones v. Meehan*, that the 1834 deletion *only took a special kind of federally detribalized land held by individual Indians out of the Nonintercourse Act* — namely — individual sections of land reserved by federal treaty.
>
> The key is — individual Indian "detribalized" rights versus individual Indian "derivative" rights.
>
> The treaty reservations themselves *detribalized* these individual sections of tribal land. They extinguished the sovereign alienation restriction that had been attached.
>
> Put another way —
>
> The 1834 deletion had absolutely *no bearing on individual Indian derivative rights in tribal land or its appurtenances* — or as they are also called — individual Indian rights to commons.
>
> And the local significance of this critical distinction is that *not one square foot of Indian land in Massachusetts has ever been detribalized* either by federal treaty reservation (as in *Jones v. Meehan*), or by federal executive patent or special Act of Congress (the only two other methods the United States uses to detribalize Indian land.)
>
> In short —
>
> *Indian land in Massachusetts remains tribal land* — and — *the federal alienation restriction remains attached.*
>
> Therefore, individual Indian derivative rights in tribal land in Massachusetts, as elsewhere in the United States, are still as fully protected under the Nonintercourse Act as under the Constitution and the federal Indian common law."

A. *In Addition, The Decision Below Directly Conflicts With Attorney General Garland's 1886 Opinion and Interior Department's Longstanding (100 Year) Policy That The Indian Nonintercourse Act Prohibits Federally Unauthorized Transactions In Tribal Land By Individual Indians As Well As By Their Tribes.*

In an opinion to the Interior Secretary nearly 100 years ago, Attorney General Garland advised:

> "Upon examination of the statutes and treaties, I feel justified in coming to the conclusion that it was the intention of Congress that the inhibition contained in section 2116, Revised Statutes [Nonintercourse Act], should have the same application to individual Indians that it has to the Indian nations and tribes." 18 Ops. Atty. Gen. 486, 487 (1886).

And citing this Court (*Jones v. Meehan*) and Attorney General Garland, the Interior Department Solicitor more recently emphasized Department policy: "If the tribe may not sell tribal land neither may the individual members sell tribal land or any interest therein." Op. Sol. I.D., November 21, 1942.

So in petitioners' view, *Jones v. Meehan* coupled with the Garland opinion and Interior policy, leaves no doubt the Nonintercourse Act prohibits *both* tribal *and* individual Indian transactions in tribal land without federal consent. Accordingly, petitioners believe individual Indians derivatively share their tribe's right under the Nonintercourse Act as well as under federal common law and the Constitution to litigate forbidden transactions in tribal land as in other wrongful dilution or invasion of tribal assets. Consequently, petitioners believe the First Circuit's opinion to the contrary is fundamentally wrong.

IV. The Decision Below Directly Conflicts with this Court's Recognition of Individual Indian Standing to Protect Derivative Interests in Tribal Assets in Its *Fellows v. Blacksmith* and *McClanahan v. Arizona State Tax Commission* Decisions.

Apparently the First Circuit does not agree central control over Indians and Indian lands passed to the United States as an attribute of national sovereignty. Nor do they acknowledge any federal Indian common law or feel the Indian Commerce Clause is self-executing. And because the Court of Appeals ignores *Jones v. Meehan, supra*, it does not understand that Congress' 1834 Nonintercourse Act revision *excluded only certain individual holdings in land detribalized by treaty* from the coverage of the Act. So the First Circuit assumes "the modified (1834) [Nonintercourse Act] indicates that Congress consciously chose not [to supervise transactions involving individual Indians] but, rather to limit its supervision under the [Act] to transactions and lawsuits involving the tribes themselves." App. A10. Having set these predicates, the First Circuit concludes petitioners have no standing whatsoever to protect their derivative rights in their tribe's land or other assets.

Petitioners suggest the root of the problem is that the First Circuit confuses two entirely different kinds of individual Indian land rights.

Individual Indian rights to a parcel of tribal land specifically detribalized and individualized by federal allotment or by federal treaty (as in *Jones v. Meehan*) or by special act of Congress (the only three ways Indian title can be extinguished and tribal land converted into private holdings), are one thing.

But individual Indian derivative rights to commons in tribal land and its appurtenances (fundamental in the Indian concept of each sharing in the whole), are quite another.

As petitioners pointed out earlier in instant petition, under *Jones v. Meehan* Congress' 1834 revision of the Nonintercourse Act lifted alienation restriction from Indian land detribalized and individualized by federal treaty. In other words, individualizing by treaty was put on a par with individualizing by executive patent and congressional act.

But as Attorney General Garland and the Interior Department Solicitor emphasize, the Nonintercourse Act continues to prohibit unauthorized transactions in tribal land by a member of the tribe as well as by the tribe itself. *See* 18 Ops. Atty. Gen. 486 (1886); Op. Sol. I.D., November 21, 1942; *see also United States v. Charles, supra.*

And the Attorney General's and Interior Solicitor's view of Nonintercourse Act scope is matched by this Court's view of Indian Commerce Clause scope:

> "Commerce with the Indian tribes means commerce with the individuals composing those tribes." *United States v. Holliday, supra*, 70 U.S. at 417.

And federal control over dealings with a member of the tribe is as absolute as with the tribe itself:

> "The right to exercise it [federal power] in reference to any Indian tribe or any person who is a member of such tribe, is absolute." *Id.* at 419.

Pursuant to these postulates, this Court early recognized the right of an individual Indian to protect his possessory share of his tribe's land.

For example —

Where a non-Indian, claiming under a post-1789 grant from Massachusetts, forcibly entered Blacksmith's farm on the 12,000 acre Tonawanda reservation in New York State and "with force and arms...expelled and dispossessed [him]", this Court stated,

> "[T]hat a forcible removal must be made, if made at all, under the direction of the United States." *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857).

And in a recent case, where an Indian asserted she had derivative standing to protect her reservation-derived income from state taxation, this Court stated:

> "To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. *But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.*" *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 181 (1973) (emphasis added).

A. *In Addition, The Decision Below Conflicts With Like Recognition In Eighth and Ninth Circuit Decisions.*

In stark contrast to the First Circuit's refusal even to acknowledge individual Indian derivative rights in tribal assets let alone standing to protect them, both the Eighth and Ninth Circuits have long acknowledged individual Indian rights to commons and their standing to protect those rights.

In 1912 for example, this Court let stand an Eighth Circuit case which asserted:

> "The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. *Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property.* It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members." *Shulthis v. McDougal*, 170 F. 529, 533 (8th Cir. 1909), app. dismissed, 225 U.S. 561 (1912) (emphasis added).

And starting 13 years later, a series of Ninth Circuit cases followed suit:

> "The treaty was with the tribe, but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe — *the right to a common is the right of an individual of the community.*" *Mason v. Sams*, 5 F.2d 255, 258 (WD Wash. 1925) (emphasis added).
>
> "The individual [Indian] plaintiffs. . . have an interest in the controversy and have standing to maintain that action to assert that interest." *Sohappy v. Smith*, 302 F.Supp. 899, 904 (D.Or. 1969), aff'd and remanded, 529 F.2d 570 (9th Cir. 1976).
>
> "From *Mason* it is clear that an individual Indian enjoys a right of user in tribal property *derived* from the legal or equitable property right of the Tribe of which he is a member." *Kimball v. Callahan*, 590 F.2d 768, 773 (9th Cir.), cert. denied, 444 U.S. 826 (1979) (emphasis added).

Commenting on *Mason* in a 1940 law review article, Professor Cohen pointed out:

> "The decision in *Mason v. Sams* thus stands as a milestone in the defense of Indian rights. From this decision two conclusions may be drawn: (1) *that the individual Indian has a right to the use of a fair share of the assets of the tribe*; and (2) that the Indian bureau has no authority, in the absence of tribal agreement, to deprive any member of the tribe of the right to equal participation in tribal assets." F. S. Cohen, *Indian Rights and the Federal Courts*, 24 Minn.L. Rev. 145, 197-197 (1940) (emphasis added).

And in a recent updating of Professor Cohen's Handbook of Federal Indian Law, an editor comments on *Sohappy v. Smith*:

> "In [*Sohappy*] fourteen individual members of the Yakima Tribe sought a judicial definition of their right to fish at 'usual and accustomed' fishing grounds under an 1855 treaty. The state contended that because the fishing right was a tribal rather than an individual right, only the tribe could bring suit, but *the court held that the*

plaintiffs had standing to sue as individuals." Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.), pp. 451-452 (emphasis added).

Interestingly, the concept of a right to a common and its recognition as a cognizable property right have long been state law in the First Circuit. *See Thomas v. Marshfield*, 27 Mass. (10 Pick.), 364, 366 (1830); *Kenyon v. Nichols*, 1 R.I. 106, 110 (1848).

Clearly then, both under this Court's *Holliday, Fellows* and *McClanahan* decisions and under 'rights of common' cases in the Eighth and Ninth Circuits, petitioners believe they have standing to seek declarations of Gay Head tribal status and their derivative commons in Gay Head tribal assets. And again, petitioners believe the First Circuit is fundamentally wrong to deny their rights and their standing under federal common law, the Indian Commerce Clause and the Nonintercourse Act.

V. The Decision Below Directly Conflicts with this Court's Recognition that Protection of Indian Possessory Rights Works Primarily through Federal Common Law and the Federal Constitution, in Its *Oneida Indian Nation v. County of Oneida* Decision and Its Acceptance of the Justice Department's Recommendation to Decline Review in *Mohegan Tribe v. Connecticut*.

As noted in a previous section of instant petition, the First Circuit holds petitioners have neither derivative standing under the Nonintercourse Act nor claim under the Indian Commerce Clause. And the First Circuit does not even mention petitioners' principal claim under federal common law, let alone discuss it.

In this Court's 1974 *Oneida* opinion, Mr. Justice White emphasizes that federal Indian law came into play as an attribute of central sovereignty:

"Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands

> became *the exclusive province of the federal law*. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. . . . The United States *also asserted* the primacy of federal law in the first Nonintercourse Act. . . . The rudimentary propositions that *Indian title is a matter of federal law and can be extinguished only with federal consent* apply in all of the States, including the original 13." *Oneida Indian Nation v. County of Oneida, supra*, 414 U.S. at 667, 670 (emphasis added).

And insofar as the Nonintercourse Act is concerned, the Justice notes it was an additional assertion of a federal primacy established at the time of Union.[4]

Seven years later, in spring 1981, responding to this Court's request (450 U.S. 1028) for their view on granting certiorari in *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2nd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the Justice Department urged "the Court to decline review". Brief of the United States as *Amicus Curiae*, Connecticut v. Mohegan Tribe, U.S. Sup. Ct., No. 80-1365 (1981), p. 4.

Pointing out that the lower courts had upheld the Mohegan Tribe's Nonintercourse Act claim without reaching their constitutional or federal common law claims, the Justice Department stated:

> "One reason to doubt the recurring importance of the statutory question decided below is that the validity of Indian land sales, like those challenged here and in similar cases, most probably does not depend upon the coverage of the Nonintercourse Acts. . . . [Q]uite inde-

[4] In stating that "[t]he original enactment of the [Nonintercourse Act] in 1790 suggests that the First Congress did not believe that the Indian Commerce Clause — in an of itself — prohibited state laws validating Indian lan conveyances. Otherwise why would the [Nonintercourse Act] have been necessary?", App. , the First Circuit overlooks the historical purpose of the enactment, namely, to prevent crime. *See Cayuga Indian Nation v. Cuomo, supra*, 565 F.Sup. at 1320.

> pendently of any statutory restraint, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and *any such attempted transaction is accordingly void as a matter of law, without reference to the Nonintercourse Acts*. . . .The exclusive authority of the federal government to extinguish Indian title is rooted in the Constitution itself and in the necessary attributes of sovereignty that passed to the federal government upon formation of the Union and adoption of the Constitution." *United States Mohegan Brief, supra*, pp. 4-7 (emphasis added).

The Justice Department concluded by emphasizing that this Court had "reaffirmed this rule most recently in *Oneida*. . . ." *Id.* at 5. Accordingly, this Court acceded to the Department's recommendation and declined review.

And just this year, in *Cayuga Indian Nation v. Cuomo, supra*, Federal District Judge Neal McCurn reaffirmed federal common law as the primary source of protecting Indian possessory rights:

> "To be sure, there is an unfortunate lack of specificity in early federal court cases involving Indian possessory rights as to the governing sphere — state or federal — which provided the right of action. . . .Nevertheless, it has long been clear that 'Indian title is a matter of federal law',. . .and, properly viewed, *it is federal common law that has implicitly supplied the right of action in federal possessory actions.*" *Id.*, 565 F.Supp. at 1319 (emphasis added).

Accordingly, petitioners believe the First Circuit's reliance on the Nonintercourse Act as the primary source of protecting Indian possessory rights to the exclusion of federal common law and the Constitution is entirely misplaced. And as Justice White points out, the Nonintercourse Act is just an add-on and clearly derivative of national sovereignty and the federal Constitution.

VI. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE POLICY OF LIBERAL PLEADING AMENDMENT AFFIRMED BY THIS COURT'S *FOMAN V. DAVIS* RULING.

As stated, not satisfied that either the suit by a rival group within the 'dispossessed' Gay Head Tribe (*Gay Head I*) or its proposed settlement was in the best interests of the Tribe, petitioners brought instant suit (*Gay Head II*) on behalf of all members-descendants of the Gay Head Tribe, individually and as a class,[5] asserted the Tribe's entire cause of action in land and all other assets, and as required in declaratory proceedings, named all parties having any interest in the proceeding as defendants including the Tribe.

On 17 December 1982, the District Court, refusing to recognize petitioners' class claim as tribally representative and refusing to recognize individual Indian derivative rights of common or user in tribal assets, dismissed, stating:

> "The plaintiffs in this action lack standing to litigate their claims under the Nonintercourse Act, 25 U.S.C. § 177, since only an Indian nation or tribe may bring an action under that Act." App. B1-2.

Invoking this Court's policy of liberal pleading amendment, petitioners moved to amend their complaint on 20 December 1982, just three days after dismissal, proposing to restructure the parties by joining, *inter alia*, the Gay Head Tribe as a plaintiff. The district court denied their motion without opinion.

The First Circuit affirmed, holding that petitioners' class claim was not tribally representative, that petitioners had not originally named the tribe as a plaintiff, that under First Circuit precedent petitioners should have moved to amend before dismissal, and not having done so, should be bound by the consequences of their pre-dismissal strategy.[6] App. A12-13.

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[5] As argued to the First Circuit, petitioners considered their class claim tribally representative under *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1901) and other cases.

[6] The First Circuit stated the district court denied the motion to amend as "untimely". App. A12. However, the district judge merely wrote "denied" on the motion without *any* supporting reason.

Twenty years ago, this Court struck down a similar First Circuit posture:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), sec.'s 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared person — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis* 371 U.S. 178, 182 (1962).

Accordingly, petitioners believe the First Circuit's view denies them procedural and substantive due process.

Conclusion

For the reasons stated, petitioners believe they should be granted review.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 83-1026

FRANK B. JAMES, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

JAMES G. WATT, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before
COFFIN and BREYER, *Circuit Judges*,
and SELYA,* *District Judge*.

Robert C. Hahn, with whom *William A. Hahn*, and *Hahn & Matkov* were on brief, for appellants.

Allan van Gestel, with whom *Andrew S. Hogeland*, and *Goodwin, Procter & Hoar* were on brief, for appellees Christopher S. Look, Jr., as Sheriff of Dukes County, Beverly W. King, as Register of Deeds for Dukes County, and Alexander D. Forger, Trustee.

Thomas N. Tureen, with whom *Tureen & Margolin* was on brief, for appellee Wampanoag Tribe of Gay Head.

Thomas R. Kiley, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Paul R. Matthews*, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

Jacques B. Gelin, Attorney, Department of Justice, with whom *Carol E. Dinkins*, Assistant Attorney General, *William F. Weld*, United States Attorney, and *Anne S. Almy*, Attorney, Department of Justice, were on brief, for appellee United States Secretary of Interior.

August 24, 1983

* Of the District of Rhode Island, sitting by designation.

BREYER, *Circuit Judge.* The plaintiffs in this case are individual Indians who claim an interest in land on Gay Head Peninsula, Martha's Vineyard, Massachusetts. In order to prevail, they must upset the present landowners' chain of title by showing that certain conveyances made many years ago by the Gay Head Indian tribe (or by individual Indians) are invalid. The district court granted summary judgment against the plaintiffs, from which they appeal. We find that the district court was correct.

A

The plaintiffs' initial argument is based upon the Indian Nonintercourse Act (the INA) — a federal statute that provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. The plaintiffs argue that the relevant conveyances were not made pursuant to a "treaty or convention," that Massachusetts law could not authorize what the INA forbade, and that the conveyances are therefore invalid. The district court correctly rejected this argument, however, on the ground that the plaintiffs sued as individual Indians, The plaintiffs did not seek to represent the tribe, nor did they name the tribe as a plaintiff in the suit. We are not certain why they did not do so. But we know that the Gay Head Indian tribal government earlier filed a related suit by, and on behalf of, the Gay Head tribe; and we believe that plaintiff Indians here are dissidents who disapprove of the way that suit is being handled. This litigation strategy apparently played a role in the framing of their complaint.

Regardless, this court has held that the INA was designed to protect the land rights only of *tribes*; that the INA

therefore granted a cause of action to tribes; and that individual Indians could not assert INA rights on their own behalf. *See Epps* v. *Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979); *see also Mashpee Tribe* v. *Watt*, 542 F. Supp. 797, 803 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527, 537 (N.D.N.Y. 1977); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 803 (D.R.I. 1976). In *Epps* v. *Andrus*, 611 F.2d at 917 (original in ital.), we explicitly stated that to invoke the INA a plaintiff "must show that . . . it is or represents an Indian 'tribe' within the meaning of the Act. . . ." That holding is *stare decisis* in this circuit, and we shall not reexamine it. Thus, plaintiffs' claim, insofar as it is based on the INA, must fail.

B

The plaintiffs raised another argument below, which they now press strongly on appeal. They argue that the Indian Commerce Clause, U.S. Const. art. 1, § 8, automatically (in and of itself, without the INA) invalidated the Massachusetts statutes permitting the conveyances in question. *See* 1870 Mass. Acts ch. 213; 1869 Mass. Acts ch. 463; 1862 Mass. Acts ch. 184, and that the conveyances were therefore invalid. The Indian Commerce Clause grants to Congress the "Power . . . To regulate Commerce . . . with the Indian Tribes. . . ." In the plaintiffs' view, this grant of power is exclusive, and took from Massachusetts *all* power to legislate in the area of Indian affairs.

Plaintiffs' proposed interpretation of the *Indian* Commerce Clause closely resembles James Madison's view of the *Interstate* Commerce Clause, U.S. Const. art. 1, § 8. Madison, believing it essential that states not be able to restrict trade among themselves, *The Federalist* No. 42 (J. Madison); 3 *The*

Records of the Federal Convention of 1787 at 478, 547-48 (M. Farrand ed. 1937), apparently thought that the mere existence of the Clause precluded state legislation regulating interstate commerce, regardless of whether Congress chose to exercise its own power to legislate. *See id.*; L. Tribe, *American Constitutional Law* § 6-3 (1978); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 431 (1982); *cf.* Tribe, *Toward A Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L. J. 515, 521 (1982) [hereinafter cited as "Tribe, *Silence*"]. In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), Chief Justice Marshall, following the Madisonian interpretation, suggested that the Clause not only grants Congress regulatory power over interstate commerce, but also "excludes, necessarily, the action of all others that would perform the same operation on the same thing." Soon after Chief Justice Marshall's tenure, however, the Supreme Court began to expand the area in which states were free to act. *See, e.g., The License Cases*, 46 U.S. (5 How.) 504, 573-74 (1847); L. Tribe, *American Constitutional Law* § 6-3. And, modern cases use a particularized analysis, weighing the strength of relevant state and federal interests, to determine whether or not the Interstate Commerce Clause forbids a particular state law as an unconstitutional "burden" on interstate commerce. *See, e.g., Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 186-87 (1950); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770-71 (1945); L. Tribe, *American Constitutional Law* § 6-5. Thus, the strong Madison/Marshall "preemptive" view of the Interstate Commerce Clause is no longer the law of the land. *See* L. Tribe, *American Constitutional Law* §§ 6-4 to 6-26.

Similarly, in citing Chief Justice Marshall's strong, preemptive interpretation of the *Indian* Commerce Clause, plaintiffs overstate the force of the Clause under modern Indian law. In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), for example, the Chief Justice wrote that "[t]he whole intercourse

between the United States and this [Cherokee] nation, is, by our constitution and laws, vested in the government of the United States." *See also Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (Marshall, C.J.). Nevertheless, despite similar dicta in some later cases, *see, e.g., Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974), Supreme Court decisions since Chief Justice Marshall's time have generally rejected the concept that the Clause automatically and necessarily preempts all state laws dealing with Indians. Instead, these decisions have tended to expand the area in which states may legislate. *See, e.g., Rice* v. *Rehner*, 51 U.S.L.W. 5141, 5144-46 (U.S. July 1, 1983); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 n.17 (1976); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 74-76 (1962); *United States* v. *McGowan*, 302 U.S. 535, 539 (1938); *New York* v. *Dibble*, 62 U.S. (21 How.) 366, 370 (1858). And, when the Supreme Court has found state legislation preempted, it has used an analysis that balances the interests of the federal, state, and tribal authorities, rather than any rule that automatically preempts state statutes on the basis of the Clause. *See, e.g., New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. 4741, 4743 (U.S. June 13, 1983); *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 50 U.S.L.W. 5101, 5102 (U.S. July 2, 1982); *White Mountain Apache Tribe* v. Bracker, 448 U.S. 136, 145 (1980); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). This shift in the method of analysis is fatal to plaintiffs' case for one simple reason: plaintiffs' only hope of success rests upon a strict, absolutist view of Indian Commerce Clause preemption. Any "interest balancing" approach — in view of the enactment of the INA — leads to the conclusion that the Indian Commerce Clause does not preempt the application of the relevant Massachusetts laws to this case.

To see why this is so, first imagine the circumstances in which plaintiffs' preemption argument would be strongest —

namely, if Congress had never enacted the INA. Even under those circumstances, one could make a strong argument for the validity of the state statutes — an argument based upon the special, bifurcated nature of Indian land title. That argument would run as follows:

As the Supreme Court noted in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. at 667, American courts recognize two distinct levels of ownership in Indian lands: fee title and Indian title. The common-law fee title passed to the European sovereign at discovery, and it could be transferred by him to his grantees. The fee title in lands that the British king retained passed to the individual states at the time of the revolution. These states, in turn, ceded to the central government their claims to the western territories beyond boundaries. Title to Indian lands within their borders, however, was retained by the thirteen original states. (To the extent that our comment in *Epps* v. *Andrus*, 611 F.2d at 916 suggests the contrary, it is withdrawn.) *See Oneida Indian Nation* v. *County of Oneida*, 414 U.S. at 670; *Seneca Nation* v. *Christy*, 162 U.S. 283 (1896); *United States* v. *Franklin County*, 50 F. Supp. 152, 156 (N.D.N.Y. 1943); Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 36 & n.73 (1979); Dwyer, *Land Claims Under the Indian Nonintercourse Act*, 25 U.S.C. § 177, 7 B.C. Env. Aff. L. Rev. 259, 265 n.41 (1978); *cf.* M. Jensen, *The Articles of Confederation* 198-238 (1966) (historical background to land cessions).

Indian title, which gave Indians a "right of occupancy," coexisted with the fee title. This "right of occupancy" was legally significant in several ways. For one thing, only the sovereign (the king, the state, the federal government) could destroy this right; and, as long as the Indians retained it, ownership of the fee title brought with it no present right of possession. Rather, the fee owner "received a contingent future interest which ripened into a fee simple" only when

the Indians abandoned their possessory interest (or when the sovereign, holding fee title, took that *possessory* interest). F. Cohen, *Handbook of Federal Indian Law* 321 n.372 (1942). For another thing, the courts did not otherwise recognize transactions involving this "right of occupancy." Because the owner of fee title held the "exlusive right to extinguish" the "right of occupancy," *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 585 (1823), efforts by Indians to convey their possessory rights were not recognized by American courts. Instead, one who purchased such rights from the Indians "incorporate[d] himself with them"; if the Indians chose to take their rights back, as far as the U.S. courts were concerned, that was up to them. *Id.* at 593. All these, and related rules, were explained by Chief Justice Marshall in *Johnson* v. *McIntosh*, and were reaffirmed in subsequent cases. *See, e.g., Oneida Indian Nation* v. *County of Oneida*, 414 U.S. at 667-74; *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279-81 (1955); *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345-46 (1941); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 115-16 (1938); *Cramer* v. *United States*, 261 U.S. 219, 229-30 (1923); *Buttz* v. *Northern Pacific Railroad*, 119 U.S. 55, 66-67 (1886); *Beecher* v. *Wetherby*, 95 U.S. 517, 525 (1877); *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711 (1835) (Marshall, C.J.); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Marshall, C.J.); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) (Marshall, C.J.); *Jackson* v. *Porter*, 13 F. Cas. 235, 240 (N.D.N.Y. Cir. Ct. 1825) (No. 7,143).

Against this background, one might argue that the Massachusetts statutes giving Indians fee title and the power to alienate land, were not efforts to *take* land rights *from* the Indians, but rather efforts to *convey* the state's fee title *to* them and thereby to grant them their lands in fee simple absolute. These statutes may have been Massachusetts' own attempt to undo its earlier cases and statutes limiting the rights of Indians in their aboriginal lands to posessory title and

invalidating conveyances of that title. *See* 1701 Mass. Prov. Laws ch. 11; *The Book of the General Lavves and Libertyes Concerning the Inhabitants of the Massachusets* [*1660*], at 161 (statute enacted 1633), *reprinted in The Colonial Laws of Massachusetts* (1889 ed.); *City of Lynn* v. *Inhabitants of Nahant*, 113 Mass. 433, 449 (1873); *Commonwealth* v. *City of Roxbury*, 75 Mass. (9 Gray) 451, 478-79 (1857) *Brown* v. *Inhabitants of Wenham*, 51 Mass. (10 Met.) 495, 498 (1845); *Clark* v. *Williams*, 36 Mass. (19 Pick.) 499, 500-01 (1837). Thus, these statutes might be seen as part of an effort to remove the legal disabilities of the Indians and grant them full citizenship — as part of an effort that included the passage of an 1869 statutory provision granting Indians "all the rights, privileges and immunities" of state citizens, 1869 Mass. Acts ch. 463, § 1, and the ratification by Massachusetts of the Fourteenth Amendment in 1867.

We need not decide whether this explanation of the Massachusetts statutes would have been sufficient to render them constitutional, despite the Indian Commerce Clause, in a hypothetical world without the INA. One could still have attacked them as unconstitutional by arguing that, regardless of the motives of the Massachusetts legislature, the statutes allowed the Indians to convey title to their lands; that the Indian Commerce Clause was designed to place in the hands of the federal government the decision of whether to allow conveyances by Indians; and that the Clause therefore "froze" the lands rights of the various Indian tribes until either they voluntarily abandoned their lands or Congress voted to permit a conveyance. One could note, as well, that the question of "when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*" is a matter that "rests with Congress." *United States* v. *Nice*, 241 U.S. 591, 598 (1916). On the other hand, one could have argued, in support of the statutes, that Massachusetts was entitled under its general police powers to provide a fair, expeditious, and judicially recognized mechanism for a tribe to convey its

possessory rights to its own members if it chose to do so, and that Massachusetts was entitled as fee owner to transfer its title to such members of the tribe. One might add that Massachusetts' primary objective was apparently to help integrate into the non-Indian community those individual Indians who wished to do so, and that it did this without interfering with the area of primary federal concern — the "commerce" between the "settlers" and the semi-autonomous tribes. We do not pretend to know who would have won this hypothetical argument. We wish only to point out that — even without the INA — the Massachusetts statutes are not *clearly* unconstitutional; rather, the outcome of the argument is uncertain. *See generally* Tribe, *Silence*, *supra*, (exploring difficulties of interpreting congressional failure to legislate).

Next consider how the relevant features of the constitutional argument change once one takes account of the fact that Congress passed and modified the INA, 1 Stat. 137 (1790); 4 Stat. 729 (1834), to allow Indian tribes to invalidate transfers of (fee or Indian) title to their lands, if the transfers were made without the specific approval of the federal government. For one thing, the constitutional question itself changes. The INA clearly preempts state statutes that conflict with its terms. But, the relevant question now is whether the Indian Commerce Clause preempts state statutes *outside* the INA's scope. For another thing, the INA reflects a congressional judgment about the weight of the relevant federal, state, and tribal interests — interests that the Supreme Court has instructed us to balance to determine whether the Indian Commerce Clause preempts a particular state enactment. *See Rice* v. *Rehner*, 51 U.S.L.W. at 5142-46; *New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4743-44; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 50 U.S.L.W. at 5102; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 145. That congressional judgment helps us conclude that this "balance" tilts decisively in favor of the application

of the state laws. First, the terms of the Indian Commerce Clause itself grant the federal government the authority to regulate commerce "with the Indian *tribes*." Although the federal government may choose to supervise transactions involving individual Indians, *see, e.g., United States* v. *Nice*, 241 U.S. at 600, the modified (1834) INA indicates that Congress consciously chose not to do so, but, rather, to limit its supervision under the INA to transactions and lawsuits involving the tribes themselves. These facts suggest that the federal interest in nontribal transactions is comparatively small. *Cf. New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4744 (to find whether a federal interest exists, examine whether the interest is "reflected in federal law").

Second, where individual Indians are involved, the state has a valid interest in maintaining the stability of land transactions entered into according to its laws, in treating all of its citizens equally, and in providing the same property rights to all of its citizens. These factors support Massachusetts' power to act in the area.

Third, the interest of the tribe itself is smaller *outside the area that the INA protects*. In this case, application of the state statutes against the plaintiffs will conflict with no claim that the tribe itself might assert, and will not "interfere with the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 50 U.S.L.W. at 5102. Given the lack of any substantial federal or tribal interests that significantly support preemption, "the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4744.

Finally, even though " congressional intent" is not the "sole touchstone" of preemption analysis, *New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4744, it does support the enforcement of the state statutes in this case. The original enactment of the INA in 1790 suggests that the first

Congress did not believe that the Indian Commerce Clause — in and of itself — prohibited state laws validating Indian land conveyances. Otherwise, why would the INA have been necessary? The views and actions of the first Congress, made up of many of the Constitution's framers, are entitled to considerable weight in cases like this of constitutional interpretation. *See Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 297 (1888), *quoted with approval in Marsh* v. *Chambers*, 51 U.S.L.W. 5162, 5164 (U.S. July 5, 1983). Moreover, Congress' modification of the INA in 1834, limiting its applicability to tribal conveyances, suggests that Congress believed that similar activities beyond the scope of the INA did not "stand[] as an obstacle to the accomplishment," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), of the objectives it hoped to accomplish through the statute. We should hesitate to find the federal interest in activities outside the scope of the statute "weighty" enough to warrant preemption in the face of such a contrary congressional suggestion. *See id.* at 70 ("object sought to be attained" by Congress is "important in considering ... whether supreme federal enactments preclude enforcement of the state laws"); *cf. Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946) (Congress can limit preemptive scope of Interstate Commerce Clause); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945) (same). *Compare Durousseau* v. *United States*, 10 U.S. (6 Cranch.) 307, 314 (1810) (statute affirmatively describing jurisdiction will "imply a negative" as to jurisdiction not described) *with Hines* v. *Davidowitz*, 312 U.S. at 74 (all state regulation preempted where Congress planned for "one uniform national registration system"). In sum, what we can infer about congressional intent supports the conclusion we reached by "weighing the interests" — that, at least after the enactment of the INA, the Indian Commerce Clause does not invalidate the Massachusetts statutes here in question. Since plaintiffs here cannot assert a claim that falls within the scope of the INA (see Part A *supra*), and since the Indian

Commerce Clause does not offer an independent ground for holding these conveyances invalid, the district court's dismissal of their claim was proper.

C

After their claims were denied below, plaintiffs moved to amend their complaint, *inter alia*, to include the Gay Head Tribe as a party plaintiff. The district court denied the motion as untimely. The plaintiffs appeal this ruling as well, but we find no basis for reversal. A motion to amend is normally made before judgment. Sometimes a later effort to amend might be proper. *See* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1489 (1971). But here plaintiffs waited until they lost their case as individuals before moving to include the tribe as plaintiff *and* they offered no reason to explain why they did not move to amend sooner. Accordingly, their motion was properly denied. *Hayes* v. *New England Millwork Distributors, Inc.*, 602 F.2d 15, 19-21 (1st Cir. 1979); *Ondis* v. *Barrows*, 538 F.2d 904, 909 (1st Cir. 1976); *see United States Labor Party* v. *Oremus*, 619 F.2d 683, 692 (7th Cir. 1980); *Jackson* v. *American Bar Association*, 538 F.2d 829, 833 (9th Cir. 1976); *Landon* v. *Northern Natural Gas Co.*, 338 F.2d 17, 20 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965).

We have no reason to believe that the plaintiffs' failure to amend earlier was inadvertent. For one thing, their attorney here is the same attorney who handled the appeal in *Epps* v. *Andrus*, *supra*. Therefore, he was aware of the need to assert that a plaintiff "is or represents an Indian 'tribe.' " *Id.* at 917. For another thing, as previously mentioned, other Indians have brought a suit on behalf of the Gay Head tribe to obtain land on the peninsula, and they are presently in the process of settling their suit. The plaintiffs here disagreed with the plaintiffs in the other suit, but they evidently did not, or could not, name the tribe as a party plaintiff in this case because the other plaintiffs control the tribe. These facts sug-

gest to us that the pleadings in this case were drawn as part of a litigating strategy and plaintiffs showed the district court no reason why they should not be bound by the consequences of that strategy. In any event, the issue at stake — whether plaintiffs here have a right to upset the settlement entered into by the tribe and its other members — is more appropriately before us in another case appealed to this court, *Wampanoag Tribal Council of Gay Head, Inc.* v. *Town of Gay Head,* No. 83-1163, scheduled to be heard this September.

Under these circumstances, we find no abuse of the district court's discretion in its denial of plaintiffs' motion to amend the pleadings. To require the district court to permit amendment here would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision. Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances. *See* 6 C. Wright & A. Miller, *supra,* at § 1489.

Plaintiffs' other claims are without merit, and were properly dismissed.

Affirmed.

Adm. Office, U.S. Courts — Addison C. Getchell & Son, Inc.

Appendix B

United States District Court
District of Massachusetts

CIVIL ACTION
No. 81-3204-MC

FRANK B. JAMES, ET AL.,
PLAINTIFFS
v.
JAMES G. WATT, ET AL.,
DEFENDANTS

MEMORANDUM AND ORDER

December 17, 1982

MCNAUGHT, D. J.

In this action, the plaintiffs, 102 individuals who claim to be members or descendants of members of the Wampanoag Tribe of Gay Head, claim the right to possession of all the lands of the Town of Gay Head. They allege violations of the Indian Nonintercouse Act, 25 U.S.C. § 177, the Constitution, and several federal statutes.

The defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. For the reasons which follow, all defendants' motions are allowed.

I. *Nonintercourse Act*

The plaintiffs in this action lack standing to litigate their claims under the Nonintercourse Act, 25 U.S.C. § 177, since

only an Indian nation or tribe may bring an action under that Act. *Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Mashpee Tribe v. Watt*, 542 F. Supp. 797 (D. Mass. 1982). The plaintiffs have sued as individuals, not as a tribe or nation, and, therefore, their claims under the Nonintercourse Act must be dismissed.

II. *Other Claims*

All of the other claims of the plaintiffs are either dependent upon their Nonintercourse Act claim or are independently devoid of merit, including those claimed to arise from basic constitutional authority and federal common law.

(A) *Commerce Clause*

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, standing alone does not provide a cause of action such as plaintiffs assert here. This clause is simply the basis for the Nonintercourse Act, under which these individual plaintiffs cannot state a claim.

(B) *Supremacy Clause*

The Supremacy Clause, U.S. Const. art. VI, cl. 2, gives priority to federal law when it is in conflict with state law. It does not support direct causes of action. As Judge Skinner recently held, "Since plaintiffs have not shown the acts of the state to be in conflict with any federal laws affecting them as individuals, the Supremacy Clause does not apply." *Mashpee Tribe v. Watt*, 542 F. Supp. at 806.

(C) *Fifth and Fourteenth Amendments*

Since the Nonintercourse Act does not protect individual rights in the land claimed, the plaintiffs' claims that they were denied due process and equal protection by defendants' fail-

ures to grant them their rights under the Nonintercourse Act must be dismissed.

(D) *Claims under 42 U.S.C. § 1983, 25 U.S.C. §§ 1321(b) and 1322(b), 28 U.S.C. § 1360(b), and 18 U.S.C. § 1162(b).*

Since the plaintiffs have not shown the occurrence of a violation of federal law or the existence of some trust relationship or other restriction against alienation, they have no cause of action under any of these statutes. *See, id.*

(E) *Claims under 42 U.S.C. §§ 4331-4335 and 16 U.S.C. §§ 461-470n and 470aa-47011*

These statutes confer no substantive rights nor do they "provide for any cause of action applicable to the actions challenged by the plaintiffs." *Id.* at 807.

III. Since plaintiffs have failed to state any claim upon which relief may be granted, all defendants' motions to dismiss must be allowed. Plaintiffs' complaint, therefore, is dismissed as to all defendants.

[SIGNED] John J. McNaught
UNITED STATES DISTRICT JUDGE

Appendix C

List of Parties

FRANK B. JAMES, HOWARD W. JAMES, JILL JAMES HADD, JUNE T. MacDONALD, VIVIAN M. JAMES, SHIRLEY E. FREETHY, PAMELA E. SZAREK, NAOMI E. FREETHY, SHARON L. RYONE, ALLEN J. RYONE, DEREK T. RYONE, ANTHONY E. POLLARD, JOAN G. PATADAL, BEATRICE PATADAL, BARBARA B. GENTRY, BERTHA ROBINSON, DAVID GILES, ADRIANA G. IGNACIO, ONA IGNACIO, AMERA IGNACIO, ANA IGNACIO, ROBIN D. MacDONALD, ROLAND F. JAMES, BENJAMIN R. JAMES, DONNA A. SACHER, CARLA CUCH, CAMERON CUCH, DAVID CUCH, RUSSELL R. GENTRY, ANYA N. GENTRY, ADRIAN S. GENTRY, IDA V. COLBY, LEWIS A. COLBY, MELVIN E. COLBY, ERIC COLBY, MICHAEL D. COLBY, BERTA WELCH, RODNEY W. SMALLEY, RICHARD HASKINS, ERNEST T. HASKINS, KENNETH SCHLOSSER, ERIC SCHLOSSER, MARCUS A. SCHLOSSER, LOIS SCHLOSSER, LEWIS A. COLBY, JR., HENRY DIAMOND, BERTHA J. MINOR, EDNA BOSWELL, GERTRUDE BOARDLY BOSWELL, DELMAR E. HASKINS, WILLARD MARDEN III, CYNTHIA VANDERHOOP AKINS, ARTHUR W. LOPES, JR., SHIRLEY JARDIN, DARYL LOPES, CARLA LOPES, BARRY LOPES, HEIDI LOPES, C. EARL VANDERHOOP, EDITH E. VANDERHOOP, ALFRED A. VANDERHOOP, BEATRICE GENTRY, THELMA WEISSBERG, HELEN MANNING, FRANK MANNING, ANITA JAMES WILSON, TONY JARDIN,

MARK JARDIN, CHRISTI JARDIN, RANDY JARDIN, AMY JARDIN, BECKY JARDIN, ABBY JARDIN, WALLACE MARDEN, ROBERT MARDEN, RAYMOND SMALLEY, F. DANA SMALLEY, RAYMOND SMALLEY, JR., ALFRED SMALLEY, ALFRED ALDRICH SMALLEY, VICTOR CRAIG SMALLEY, CYNTHIA BERNADETTE SMALLEY, TAMARA JARDIN, PIA JARDIN, SHERRI JARDIN, ROBERT S. PETERS, ELIZABETH ANN METELL, DOUGLAS E. VANDERHOOP, C. JUSTIN VANDERHOOP, KEM B. HOPKINS, HAROLD HOPKINS, HAROLD W. HOPKINS, MILTON JEFFERS, LOWELL JEFFERS, LINDA JEFFERS, IRVING JEFFERS, SHIRLEY JEFFERS, ROBERT JEFFERS, CECELIA RUBINACCI, BARBARA VIGER, SUSAN PORTER, JO-ANN RUBINACCI, GAY HEAD INDIAN RESERVATION

PLAINTIFFS

v.

JAMES G. WATT, WILLIAM WELD, WILLIAM I. RANDALL, MARILYN M. SULLIVAN, JOHN E. FENTON, JR., JOHN J. MACDOUGALL, JR., CHRISTOPHER S. LOOK, JR., BEVERLY W. KING, ALEXANDER D. FORGER, COMMONWEALTH OF MASSACHUSETTS, TOWN OF GAY HEAD, GAY HEAD TRIBE, WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., GLADYS WIDDISS, DONALD WIDDISS

DEFENDANTS

Appendix D

(Separate Submission at Filing)

1. Complaint
2. Federal Answer
3. Morse Report
4. McKenney Report
5. Congressional Report
6. Schoolcraft Report
7. Earle Report

MOTION FILED
NOV 29 1983

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK B. JAMES ET AL Petitioners	)	
v.	)	No. 83-623
JAMES G. WATT ET AL Respondents	)	
MASHPEE TRIBE ET AL Petitioners	)	
v.	)	No. 83-624
JAMES G. WATT ET AL Respondents	)	

PETITIONERS' MOTION FOR DEFERRED CONSIDERATION

Petitioners move the Court defer consideration of captioned cases pending filing of petitions in Indian land claims from the States of New York and South Carolina, and state the following reasons therefor:

1. In JAMES v. WATT, No. 83-623, the First Circuit referred to this Court's ONEIDA INDIAN NATION v. COUNTY OF ONEIDA, 414 US 661 (1974) holding that Indian title may be extinguished only with federal consent as "dicta" and not in keeping with "modern Indian law". See JAMES v. WATT, 716 F2d 71, 73 (1st Cir 1983). The First Circuit went on to hold Massachusetts statutes permitting conveyances of Indian land without federal consent valid;
2. In MASHPEE TRIBE v. WATT, No. 83-624, the First Circuit held an earlier case explicitly dismissed at the "threshold" for lack of "standing" was "on the merits" and res judicata. See MASHPEE TRIBE v. WATT, 707 F2d 23 (1st Cir 1983);
3. In two recent cases, ONEIDA INDIAN NATION v. COUNTY OF ONEIDA, Nos. 82-7436, 7486, 7526 (2nd Cir Sept. 29, 1983) and CATAWBA INDIAN NATION v. SOUTH CAROLINA, No. 82-1671 (4th Cir Oct. 14, 1983), the Second and Fourth Circuits ruled in favor of the Indians in land claims similar to JAMES and MASHPEE TRIBE;
4. Instant petitioners anticipate the ONEIDA and CATAWBA defendants will file petitions for writs of certiorari shortly;
5. Thus, inasmuch as JAMES, MASHPEE TRIBE, ONEIDA and CATAWBA represent the bulk of the post-1789 eastern Indian land claims,* instant petitioners respectfully suggest the Court, in the interests

*See table attached hereto as "A"

of judicial economy, may want to consider all Indian land claims petitions together;

6. Furthermore, instant petitioners contend the First Circuit JAMES and MASHPEE TRIBE holdings directly conflict not only with the Second and Fourth Circuit ONEIDA and CATAWBA holdings, but also with other Second and Fourth Circuit cases and numerous Supreme Court cases. So it seems to petitioners the interests of justice as well as judicial economy will be served by considering the Massachusetts, New York and South Carolina Indian land claims at the same time.

Alternatively, because Nos. 83-623 and 624 both involve Indian claims to Massachusetts Indian lands and were filed together, petitioners request the Court consider these cases together.

Respectfully submitted,

28 November 1983

ROBERT C. HAHN
HAHN & MATKOV
40 Court St., Rm. 920
Boston, Mass. 02108
1-617-523-2213

"A"

EASTERN INDIAN LAND CLAIMS

Post-1789 Claims

Connecticut	
Mohegan Tribe	600-2500 acres
Schaghticoke Tribe	400
Massachusetts	
Wampanoag Nation* (Chappaquiddick, Christiantown, Gay Head, Herring Pond, Mashpee and Troy Tribes)	24,000
New York	
Oneida Nation*	300,000
Cayuga Nation	64,000
South Carolina	
Catawba Nation*	177,000

Pre-1789 Claims

New York	
Oneida Nation	6,000,000

*Attorneys St. Clair and van Gestel, who represent some of the defendants in the Mashpee and Gay Head Wampanoag cases (Nos. 83-623, 624), also represent some of the defendants in CATAWBA and ONEIDA.

IN THE
SUPREME COURT OF THE UNITED STATES

Office - Supreme Court, U.S.
FILED
DEC 6 1983
ALEXANDER L. STEVAS
CLERK

FRANK B. JAMES ET AL
Petitioners

v. No. 83-623

JAMES G. WATT ET AL
Respondents

PETITIONERS' MOTION TO STRIKE APPEARANCES OF HENRY J. SOCKBESON, ARLINDA LOCKLEAR AND NATIVE AMERICAN RIGHTS FUND FOR GAY HEAD TRIBE

Petitioners move the Court strike the appearances of Henry J. Sockbeson, Arlinda Locklear and Native American Rights Fund (NARF) for the Gay Head Tribe.

Although, in petitioners' view, the Gay Head Tribe is a nonterminated federal tribe and exists as a conceptual entity and juristic person, it has no functioning tribal organization, having been dispossessed by Massachusetts in 1869 and 1870 (albeit wrongfully) of both its land base and its tribal povers. See 1869 Mass. Acts c. 463; 1870 Mass. Acts c. 213.

It is true there is a 1974 case (Gay Head I), pending in the Massachusetts Federal District Court, brought by the so-called Gay Head Tribal Council, Inc. But in petitioners' view, not only the asserted claim and inherent structure of Gay Head I were legally insufficient, the case was going nowhere.

So in December 1981, having filed, then withdrawn intervention in Gay Head I, petitioners brought instant separate action (Gay Head II) on the theory that 102 Gay Head members-descendants individually and as a class, seeking tribal and derivative status declarations on the Gay Head Tribe's entire claim, was the legal equivalent of a tribal action. See UNITED STATES v. ASHTON, 170 F 509, 511 (WD Wash 1909); STURDEVANT v. WILBER, 456 F Supp 428 (ED Wis 1978), 464 F Supp 327 (ED Wis 1979).

And because a declaratory proceeding must include all parties affected, along with the several public and private class defendants, petitioners joined the Gay Head Tribe, the so-called Gay Head Tribal Council, Inc. and the so-called Gay Head leaders Gladys and Donald Widdiss.

Although their theory and joining the Tribe as a defendant were challenged, petitioners explained to the First Circuit:

> "'The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation.' FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1971 UNM reprint of 1942 ed.), p. 183.
>
> "So analogizing to the law of corporations, the Gay Head Tribe is not in reality a defendant in this action:
>
> 'Simply stated, in a derivative suit a minority shareholder places himself in the shoes of the corporation to enforce the corporate right, and the interests of the plaintiff-shareholder and the corporate defendant become merged.
> * * *
> Conceptually, the corporation, although nominally a defendant, is in actuality a party plaintiff because a successful suit will ostensibly benefit the corporation.' IN RE KINSEY, 51 LW 2561, 2562 (Ore Sup Ct

In fact, after District Court dismissal, hoping to clear up any conceptual problem, petitioners moved to amend by naming the Tribe and adding the Wampanoag Nation as plaintiffs.

In addition, petitioners found a recent Indian case fully supporting their theory -- holding that where there is no functioning tribal organization, "(i)t was ...not only appropriate, but necessary...the...suit be brought by individual Indians." SHORT v. UNITED STATES, 661 F2d 150, 155 (Ct Cl 1981)(emphasis added).

Accordingly, petitioners believe their Gay Head II action is legally sound and NARF's Gay Head I action is legally deficient.

Furthermore, contrary to the representation of NARF and their Attorneys Sockbeson and Locklear, the Wampanoag Tribal Council of Gay Head, Inc. is not the "duly organized and elected government" of the Gay Head Tribe.

Rather, this Massachusetts non-profit membership corporation (herein 'State corporation') was formed in 1972 as a Gay Head Indian historical and cultural society. And even had the incorporators or Massachusetts intended or attempted more, a State cannot create or empower a tribal governing body. UNITED STATES v. PAWNEE BUSINESS COUNCIL, 382 F Supp 54 (ND Okla 1974).

As stated, in 1974, on the advice of NARF's New England Attorneys Tureen and Margolin, the 'state corporation' sued the Town of Gay Head for return of 230 acres of tribal common land. WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC. v. TOWN OF GAY HEAD, CA No. 74-5826-Mc (Gay Head I).

Attorney Douglas Randall, Special Town Counsel for Gay Head in 1975 and now, immediately challenged the 'state corporation's' legal capacity:

> "The defendants move the Court...(t)o dismiss the action on the ground that the Court lacks jurisdiction over the party plaintiff in that said plaintiff lacks standing to bring this suit because the Wampanoag Tribal Council of Gay Head neither represents nor is the same as the Wampanoag Tribe, and further that the Wampanoag Tribal Council, Inc. is not the legal successor to the Wampanoag Tribe's rights." TOWN OF GAY HEAD'S MOTION TO DISMISS, CA No. 74-5826-Mc (Gay Head I), filed January 23, 1975.

> "If suit has been brought by the council as a corporate entity, the laws of the state where it was incorporated determine its capacity to sue. ...Defendants assert that nowhere in the pleadings is there any evidence as to how the corporation gained its authority to represent all Wampanoag Indians, nor are there any facts which indicate that plaintiff corporation has any legal rights which have been infringed." DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO DISMISS, CA No. 74-5826-Mc, filed April 25, 1975, pp. 13-14.

> "The complaint in paragraph 4 refers to the plaintiff as the Wampanoag Tribal Council of Gay Head, Inc., while the caption lists plaintiff as the Wampanoag Tribal Council of Gay Head; the distinction is of major importance. If the former case is correct, there is nothing to indicate how the corporation (whether business or charitable) succeeded to the rights of the Wampanoag Indians or Wampanoag Nation, and if or how said members of that tribe gave to the corporation authority to bring this suit on behalf of all said Indians or Indian nation. The defendants know of no federal rights in said corporation." Id. at 3.

Interestingly, NARF Attorneys Tureen and Margolin agreed:

> "Defendant further argues that if the Council is incorporated, its capacity to sue is to be determined by Massachusetts law. For purposes of the motion to dismiss, this proposition may be conceded." PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT AND MOTION TO DISMISS, CA No. 74-5826-Mc, filed in 1975, p. 7 (emphasis added).

In fact, NARF's lawyers sidestepped the state corporation's legal incapacity by adding the Gay Head Tribe as plaintiff. And there Gay Head I rested for eight years, without action except two allowed defendant interventions, until certain non-Indians living on the Gay Head reservation recently instigated the current push to settle Gay Head I as part of an effort to moot petitioners' case, Gay Head II.

Acceding to this non-Indian pressure, NARF attorneys Tureen and Margolin prepared a Joint Memorandum of Agreement by and between the 'state corporation', the Town of Gay Head, the Commonwealth of Massachusetts and the non-Indian Gay Head Taxpayers Association.

Quite simply, one of petitioners' fundamental positions is this --

If the principal parties to Gay Head I, namely, the 'state corporation' and the Town, agreed in 1975 the 'state corporation' lacked legal capacity to sue on behalf of the Gay Head Tribe and/or the Gay Head Wampanoags, then a fortiori, the 'state corporation' lacks legal capacity in 1983 to settle Gay Head I on behalf of the Gay Head Tribe and/or the Gay Head Wampanoags.

Yet this is just what NARF proposes the 'state corporation' do in concert with its three co-signers:

> "(T)he Tribal Council on behalf of all persons of Indian descent hereby agree that this settlement is in full compensation for the claims so extinguished." JOINT MEMORANDUM, p. 6 (emphasis added).

> "(T)he provisions...are...intended to extinguish claims made by any Indians, whether advanced by individuals, groups or tribes." Id. (emphasis added).

Also in NARF's draft settlement, the 'state corporation' disclaims the very existence of the Gay Head Tribe:

> "Neither the provisions of paragraph 1 nor this Joint Memorandum of Understanding as a whole shall be deemed an admission of the existence of a tribe...." JOINT MEMORANDUM, p. 6.

Yet in their brief to this Court, NARF and its Washington attorneys Sockbeson and Locklear purport to appear and speak for the Gay Head Tribe, the very tribe NARF's New England attorneys Tureen and Margolin agree the 'state corporation' should disclaim.

In other words, if it helps settle Gay Head I, NARF is willing to disclaim the Gay Head Tribe. But if it helps scuttle petitioners' Gay Head II case, NARF fully embraces the Gay Head Tribe.

Countering these machinations, even though their separate suit implied withdrawal, petitioners expressly withdrew from the 'state corporation' and invoked Massachusetts'

statutory bar against unauthorized name use and privacy invasion. See MGL c. 214, secs. 1 and 3A. Although the NARF and other 'settlement' attorneys removed petitioners' State action to the federal district Judge handling Gay Head I, petitioners have gone to the First Circuit for injunctive and preventive relief.

Now, getting back to the Settlement Agreement --

Before signing, the Widdisses needed the appearance of Indian approval without revealing the settlement terms to the press or petitioners ahead of time.

Although instant petitioners estimate there are two to three thousand members-descendants of the Gay Head Tribe, there is no Tribal Roll. But the 'state corporation' and the Widdisses have created a 350 corporate member voting list.

So on or about 14 October 1983, the Widdisses quietly mailed ballots to these 350 state corporation members, instructing their return envelope be postmarked no later than 26 October 1983.

Because the ballots were mailed without prior notice, there was no chance for any educational process, thereby tainting the vote. MORRIS v. WATT, 640 F2d 404, 415 (DC Cir 1981)(Indian referendum "procedures must be 'designed to make the vote a meaningful and fully informed one.'"), quoting HARJO v. KLEPPE, 420 F Supp 1110 (DDC 1976), aff'd sub. nom. HARJO v. ANDRUS, 581 F2d 949 (DC Cir 1978).

And because the Widdisses enclosed partisan material with each ballot urging a "favorable" or "yes" vote, the vote was further tainted.

On Saturday, 5 November 1983, the Widdisses announced NARF's proposed settlement was "approved" by a vote of 169 to 29. An unknown number of ballots were "disqualified."

And it is these 169 tainted corporate member votes, less than half the Widdisses' 'special list', which NARF and their Washington lawyers would have this Court consider a 'clean' vote -- a 'tribal' vote -- an 'overwhelming' vote:

> "After careful vote the Tribe overwhelmingly approved the settlement." (NARF Opp.Br. 11)(emphasis added).

Even further, NARF lawyers Sockbeson and Locklear tell this Court, that petitioners' carefully structured individual and class action (Gay Head II), brought on behalf of the entire two to three thousand Gay Head Tribal membership, and presenting the Tribe's entire cause of action, should be disregarded as the effort of a "dissident minority". Id.

And finally NARF urges,

> Because "(t)he Tribe has spoken...this Court must not disturb (the Tribe's) determination." Id. (emphasis added).

To make sure NARF's national leadership knew what their attorneys were up to, petitioners Frank James and Thelma Weissberg with instant counsel met with NARF's Steering Committe in Washington, D. C. last month and discussed the entire matter. But the Committee decided NARF had no control over their attorneys once assigned to

an Indian client. So there was nothing they could do.

Briefly, in petitioners' view, NARF's proposed Gay Head 'settlement package' consisting of 37 pages of legal gobbledygook and word mirage, most certainly is not Indian oriented. It masks a tax-free sweetheart land deal of substantial proportions. It leaves non-Indian control of the Gay Head Reservation intact. Token say over the Gay Head common lands is given, not to the Tribe, but to the 'state corporation', and under full state and local control. All Gay Head tribal and individual Indian claims are to be extinguished, including Indian control over their 3400 acre homeland and their vital fishing and other appurtenant rights. And Indian access to their beaches and in some cases even to their own lots, will be forever cut off.

In sum, in petitioners' view, the 'state corporation' and the two Widdisses, with the advice and assistance of NARF's New England and Washington lawyers, have together broken every rule and used any device in their effort to settle Gay Head I and scuttle Gay Head II.

But this is not the first time NARF's motives, loyalties, tactics and ethics have been questioned.

In this connection, petitioners ask this Court review a most thoughtful 1980 article by a leading Native American publication entitled "N.A.R.F. ETHICS QUESTIONED", attached hereto and made a part hereof.

Respectfully submitted,

5 December 1983

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N.A.R.F.'s Ethics Questioned

The Native American Rights Fund (NARF) is the largest and probably the most famous law firm in the area of Native affairs. NARF lawyers have been the subject of major articles in a number of nationally-distributed news magazines, including *Parade*, a Sunday supplement in newspapers across the country. NARF is known to the public as a privately-funded public interest type law firm which specializes in Native peoples' causes and which gets involved in litigation in such politically sensitive areas as Native water rights, hunting and fishing issues and, among others, land claims.

In fact, NARF is the law firm which has handled (and is handling) such legal cases as the Maine (Passamaquoddy, Penobscot and Maliseet) land claim, and the Oneida and Catawba land claims. All in all, NARF is involved in most of the highly-publicized and deeply controversial Indian litigation cases presently in progress in the United States. What is not widely known about NARF is that its programs, including its land claims litigation programs, are largely financed by the federal government, and that NARF has not been telling its clients about that source of funding. NARF has also played a major role in the creation and operation of energy development organizations such as the Council of Energy Resource Tribes (CERT), and NARF has what could be described as a "revolving door" personnel program relative to the Interior Department's Solicitor's Office.

NARF began its work as an organization which was largely privately funded. A review of NARF's annual reports shows that seven years ago, less than a quarter of their budget came from federal sources. It can be argued that other public interest type law firms which are similar to NARF also take federal dollars, but as a rule, those organizations make political decisions to avoid that source of funding because the federal government is often a direct or an indirect adversary to the rights of their clients. For example, organizations such as the American Civil Liberties Union (ACLU), the Lawyers' Guild, the highly prestigious NAACP Legal Defense Program, and MALDEF (the Mexican-American legal defense program) have avoided excessive dependence on federal funding especially in areas concerning litigation. In other words, when those organizations do accept federal funding, that funding represents a low percentage of their overall operating budget and is not used in litigation. The theory which is most often heard explaining that policy on behalf of public interest legal organizations is that it is unwise to become financially dependent on an adversary which may then have the power to withdraw its support in the middle of crucial litigation matters.

The trend at NARF has been to ignore that principle. NARF's funding sources figures from 1973 to 1978 (we don't have figures for 1975) show a distinct pattern of increasing federal funding:

	Private Foundations	Govt.	Gen'l Public
1973	72%	23%	5%
1974	76	17	7
1976	58	24.5	11
1977	54	35	8
1978	43.5	43.8	9

In 1978, the single largest source of funds for NARF was the federal government. NARF's 1979 report will show 59% of their budget was derived from federal sources that year. Private funding sources speculate that the percentage of NARF's budget which is derived from federal sources could go even higher in 1980. An increasing amount of federal dollars are being used by NARF for litigation purposes.

In 1977 a controversy around NARF arose in the public media because of allegations that federal funds were being used for litigation of the Maine land claims. Tom Fredericks, who was then Director of NARF, told the press that no federal monies were being used to maintain the Indian land claims litigations in the Northeast. He was apparently telling the truth at the time, but subsequent NARF reports to their federal funding agencies indicate that federal monies have been used for litigation purposes in 1978 and 1979 in land claims litigation work in the Oneida and the Maine cases.

NARF attorney Tom Tureen, the man who heads the Indian side of the legal machinery in the Maine land claim case, seems to be confused on that issue. Recently, he told several Penobscot people in Maine that there are no federal monies involved in any litigation proceedings in the Maine case. He has refused to tell at least one local reporter anything at all about funding. The fact is that NARF's 1978 report to a federal funding agency shows that part of Tureen's salary was derived from federal funds, and that the hours that were claimed were attributed to Maine land claims work.

In a Washington, D.C. interview on March 14, 1980, AKWESASNE NOTES asked current NARF Director John Echohawk to tell us just how much of NARF's present budget comes from federal sources. He said, "about one-half, maybe a little more." We then asked him how he justified that level of federal funding in light of the fact that similar organizations feel it is an unwise policy for law firms whose clients have interests which can be defined as adverse to the interests of the federal government to become dependent on federal monies. He replied that NARF has thought about it, and has decided that federal monies do not interfere with or influence their work, and if those monies did interfere with their work, NARF would reject the monies. He further indicated that he felt that acceptance of federal monies by a law firm was a matter of policy decision, style, and opinion.

We then asked Mr. Echohawk if NARF informs its clients that NARF receives litigation monies from the federal government, and that the federal government is a party which has interests which are adverse to the claims of Indian peoples. His reply: **"No, we don't. If they ask, then we tell them. But we don't make it a policy to tell them about federal sources of funding."**

He went on to say that the fact that NARF accepts federal funding is public information and appears in NARF's annual report, which is "widely distributed." But NARF's annual reports don't show specifically what the federal monies are used for, and certainly don't indicate that the federal government directly funds litigation.

Mr. Echohawk went on at some length defending NARF's policy of accepting federal funds for litigation purposes. NARF's decision to accept federal funds for those purposes can be argued as a political decision. The fact that the Director of NARF admits that his law firm does not inform his clients about the source of litigation funds is a separate issue.

The canons of ethics of the legal profession require lawyers to tell their clients about any compensation that they receive from anyone other than the client. Those same canons virtually forbid an attorney to accept compensation from any source with an adverse interest to the client, particularly when that source is in a position to exercize strong social, economic, political or other influence, either subtly or directly, against the lawyer(s). A lawyer must exercise extreme care in those situations where the source of compensation other than the client might influence the attorney's judgment even in subtle ways. The principle expressed by the canon of ethics is that the client must approve of that source of funding. The client, not the lawyer, must decide whether or not the source of compensation might effect the lawyer's judgment in any way.

The federal government would appear to be manifestly in a position to exercize social, economic and political influence over NARF's attorneys. Mr. Echohawk's assertion that NARF lawyers faithfully represent their clients and that therefore it is not necessary that they tell their clients about federal sources of compensation in litigation matters is a view which appears to be in absolute conflict with the canons of ethics which govern the conduct of attorneys. The canons of ethics are specifically designed to allow the client to make that decision, not the lawyer.

Because of its dependency on federal funding, NARF can be seen to be in no position to be a vigorous advocate in support of Indian rights. A lawyer should be

in a position to be an unfettered advocate for a client's interests. Even in cases where there are no visible "strings" attached to federal dollars, it can readily be seen that a law firm dependent on federal sources of funding is limited to doing that work which the federal government is willing to pay for. Once an organization becomes *absolutely* dependent on federal monies, many decisions must be made on the basis of consideration of what will or will not attract federal dollars.

This will be true regardless of NARF's people's intentions. No one would believe that federal funding would have no influence on the kinds of strategies they will be able to take in order to defend Indian peoples' rights. Even if they are capable people with good will, they are not in a position to be unfettered advocates of Indian rights.

NARF's personnel history would suggest that some of NARF's people may be vulnerable to the "subtle influences" of the federal government in terms of their professional, political, and social lives. Some of NARF's staff have worked very closely with the Interior Department's Indian affairs people. NARF Attorney Larry Ashenbrenner is a former Assistant Solicitor for Indian Affairs with the Interior Department. Staff Attorney Don Miller used to be a lawyer with the Office of the Solicitor, Division of Indian Affairs of the Department of the Interior. Susan Harjo, who is on the staff but is not an attorney, only last year left her job as Special Assistant to Forrest Gerard, then-Undersecretary of Interior for Indian Affairs. She had also worked at NARF before she took the job in Gerard's office.

The man who preceded John Echohawk as Director of NARF, Tom Fredericks, went from NARF to become Associate Solicitor for Indian Affairs. As Associate Solicitor of Indian Affairs he expressed the position that by virtue of the Doctrine of Discovery, Indian people lost all title to their lands upon the "discovery" of the Americas by Europeans and that Indian people retain only such rights as the United States cares to grant them. As of this writing, Mr. Fredericks is working as a consultant in Denver, but he is presently the most-often mentioned candidate for the job Forrest Gerard left as Undersecretary of Interior.

AKWESASNE NOTES asked Mr. Echohawk about this policy of hiring not simply government lawyers for a law firm expressly created to defend Native peoples' rights, but actually hiring exactly those same individuals who had defended the federal government's interests in direct opposition to Native peoples' rights. He (not we) compared the situation to that in which lawyers and others go from government to private industry. We asked him if he could understand that the history of NARF people moving over to Interior Department and Interior Department people moving over to NARF has the color of a "revolving door" policy by both parties and that people might be justly suspicious of that. He said, "people can take jobs wherever they want." He also indicated that the people who left NARF for the Interior Department did so with the hopes that they could exercise some influence from within government positions. He offered the "hired gun" theory of lawyers – that when they work for a client, they serve that client, and when they change clients, they change completely their positions. He did not discuss what hopes he thought Interior lawyers have when they come to work for NARF, whether they hope to "change NARF from within."

There are other elements of NARF's history which may be of interest to NARF's clients and potential clients. One of the NARF annual reports states that in 1973, NARF was responsible for "securing a funding base" and IRS tax status for an organization called the Native American Natural Resources Development Federation (NANDRF). They also take credit for setting up administrative offices in Denver for that organization. In other words, they practically created the organization. NANDRF was organized to implement "the orderly and systematic development of natural resources in tribal lands" to extract copper, coal, and uranium. In 1976, another report explains, NARF did some of the same favors for the Council of Energy Resource Tribes (CERT).

That information raises more questions about NARF. During the early days of the organization, (before the heavy influx of federal funds,) NARF was the law firm for the Traditional Hopis in their battle to stop the destruction of Black Mesa. The adversary in that case was the Hopi Tribal council which had signed the lease under which the Peabody Coal Company was operating. The major legal argument which the Traditional Hopis raised in the case was that the Hopi Tribal Council was illegal, an argument which the court refused to hear on the basis of the Sovereign Immunity doctrine. The Traditional Hopis and NARF lost that case.

We asked John Echohawk if there wasn't some kind of conflict in NARF's actions in representing the Traditional Hopis against the Hopi Tribal Council and then becoming the lawyer for CERT of which the HOpi Tribal Council was a leading member. He said that NARF had discussed a possible conflict of interest, but that the Hopi Tribal Council had joined CERT at a date after the Black Mesa lawsuit had ended. Therefore, he thought, there was no conflict.

We then asked him if he thought that, since NARF had worked so closely with the federal government and CERT, and since those organizations had as their program the development of natural resources in Indian country, that this history of representation might preclude NARF from representing any group which now wished to halt development. He said that he felt that NARF would not be deterred from representing a group opposed to development even though they had a pro-development history.

There is little question that NARF has a history of appearing to be on both sides of the fence at the same time. While NARF was defending the Traditional Hopis against a development scheme, they were also midwives to CERT, and had already been nursemaids to NANDRF. NARF apparently doesn't have any problems with the implications of "guilt by association." They worked closely with John Boyden in a Northern Ute matter at the time they were defending the Traditional Hopis. John Boyden is an attorney for the Hopi Tribal Council.

NARF Director John Echohawk maintains that all these seeming contradictions don't mean anything, that NARF does its best to provide the best legal service to Indians that they can. "WE've developed some power, some influence," he said. "And that's going to help them (Indian people) directly. We know how to get things done, and we do it.... We've represented a lot of Indian people. We'll just let the facts speak for themselves."

Most of NARF's clients seem to be unaware that their lawyers are funded by their adversary. We know of no clients to whom NARF has explained the canon of legal ethics which apply to that situation, and we know of none who have approved of NARF's use of federal funds to litigate their case. At least one NARF attorney has actually been giving people factually wrong information. (For more "facts" about NARF, please read the article on the Maine land claims settlement in this issue – Ed.) The facts seem to suggest that the law firm which a decade ago showed promise of becoming a prestigious law firm defending Native people's rights similar to the NAACP Legal Defense Program or the lawyer's guild has instead become a largely federally-funded group which has apparently committed blatant violations of the canon of legal ethics concerning the requirement of disclosure to clients of compensation from a potential adversary.

That fact should be a serious disappointment to Native people in the United States. NARF has been successful, however, in placing its people in high-level government positions, and in attracting government attorneys into its fold.

John Echohawk thinks that NARF's overall effort has been fruitful. "We think this thing (NARF) has been successful," he told us. The frightening thing is, ironically, maybe he's right about that.

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ALEXANDER

No. 83-623

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANK B. JAMES, ET AL., PETITIONERS

v.

WILLIAM P. CLARK,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. Since 1974, litigation has been pending in the United States District Court for the District of Massachusetts concerning claims to land in the Town of Gay Head, on Martha's Vineyard, advanced by the Wamponoag Tribe of Gay Head Indians. *Wampanoag Tribal Council of Gay Head, Inc.* v. *Town of Gay Head,* Civil Action No. 74-5826-MC (*Gay Head I*). We are advised that an agreement in principle to settle that litigation has been reached by the immediate parties; but legislation to implement the settlement must still be enacted by Congress and the Massachusetts General Court.

Petitioners are 102 individuals who claim to be members of the Gay Head Tribe or descendents of members and who are dissatisfied with the proposed settlement of *Gay Head I.* They also brought suit in the District of Massachusetts,

claiming the right to possession of all land in the Town of Gay Head. They claim to represent a class of all members and descendents of the Tribe. First Amended Complaint, paras. 1(b), 3(a).

Petitioners allege that their aboriginal tribal ancestors came to Gay Head Peninsula on Martha's Vineyard about 4,000 years ago. In 1869, according to petitioners, the Massachusetts legislature authorized the alienation of Indian land in the State without federal assent. The following year, petitioners allege, Massachusetts, again without federal authority, purportedly incorporated the Gay Head Reservation as a town and authorized the allotment or conveyance of the Gay Head tribal lands. Petitioners further allege that as a result of the 1869 and 1870 legislation, certain Indians, without federal consent, have conveyed lands to non-Indians. Petitioners contend that because these conveyances were made without the consent of the United States, they are invalid. First Amended Complaint, paras. 11, 21-23.

The district court dismissed the complaint, reasoning that in attempting to invalidate the conveyances petitioners could not invoke the Indian Nonintercourse Act, 25 U.S.C. 177, because they sued as individuals and "only an Indian nation or tribe may bring an action under [the Nonintercourse] Act" (Pet. App. B1-B2). The district court also rejected petitioners' arguments based on the Constitution and various other federal statutes on the ground that they "are either dependent upon their Nonintercourse Act claim or are independently devoid of merit" (*id.* at B2).

The court of appeals affirmed (Pet. App. A1-A13). It too rejected petitioners' argument based on the Indian Nonintercourse Act on the ground that only a tribe may invoke

that statute and petitioners sued as individuals (*id.* at A3).[1] The court then ruled that the Indian Commerce Clause of the Constitution, Article I, Section 8, Clause 3, did not invalidate the Massachusetts statutes authorizing the conveyances because the Clause does not "automatically and necessarily preempt[] all state laws dealing with Indians" but instead requires a court to "balance[] the interests of the federal, state, and tribal authorities" (Pet. App. A5). The court of appeals then discussed these interests at length (*id.* at A5-A11) and concluded that "this 'balance' tilts decisively in favor of the application of the state laws" (*id.* at A9-A10).

2. a. In our view, the court of appeals erred in concluding that Massachusetts was free to authorize the alienation, without federal consent, of an Indian tribe's right to occupy its aboriginal lands. As this Court has recently explained (*Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974)):

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original States and the United States — a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of

[1] The court of appeals also upheld the district court's decision denying petitioners leave to amend their complaint to attempt to cure this defect (Pet. App. A12-A13).

> the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

"The rudimentary proposition[] that Indian title * * * can be extinguished only with federal consent appl[ies] in all of the States, including the original 13" (*id.* at 670).

The court of appeals appears to have dismissed these statements as "dicta" (Pet. App. A5) inconsistent with "modern Indian law" (*id.* at A4). But the principle that Indian title cannot be alienated without federal assent has been established by a long line of cases. See, *e.g.*, *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 345-347 (1941) ("Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. * * * As stated by Chief Justice Marshall in *Johnson* v. *M[c]Intosh*, [21 U.S. (18 Wheat.) 543], 586 [(1823)], 'the exclusive right of the United States to extinguish' Indian title has never been doubted."); *United States* v. *Kagama*, 118 U.S. 375, 381 (1886); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.). 515, 560 (1832); *id.* at 584 (McLean, J.); *Johnson* v. *McIntosh*, *supra*. See also *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979); *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). This ancient principle precludes the balancing of interests in which the court of appeals engaged.

The court of appeals relied (Pet. App. A5) on a number of cases decided under the Indian Commerce Clause that suggest that that Clause does not preempt all state regulations of Indian affairs. But as this Court's opinion in *Oneida* makes clear, Congress's power under the Indian Commerce Clause is not the sole source of the rule that Indian title cannot be alienated without the consent of the federal government. That principle is rooted in the relationship

between Indian tribes and the succession of sovereigns that have ruled the land they occupied, and it is among the attributes of sovereignty to which the United States succeeded. See 414 U.S. at 667, quoted at pages 3-4, *supra*.

The court of appeals also reasoned that "[t]he original enactment of the INA [Indian Nonintercourse Act] in 1790 suggests that the first Congress did not believe that the Indian Commerce Clause — in and of itself — prohibited state laws validating Indian land conveyances. Otherwise, why would the INA have been necessary?" (Pet. App. A10-A11). But the principle that Indian title cannot be alienated without the consent of the sovereign antedated the Nonintercourse Act (see *Oneida*, 414 U.S. at 667); that statute constitutes a congressional assertion of preexisting prerogatives (*ibid.*) and, of course, imposes a criminal penalty for improper attempts to obtain lands from Indians (see *id.* at 668 n.4; 25 U.S.C. 177). Indeed, in *Johnson* v. *McIntosh*, *supra*, the Court refused to recognize conveyances made by Indians in 1773 and 1775 on the basis of this principle; these conveyances occurred not only before the Nonintercourse Act was passed but before the Union was formed.

The Court in *Johnson* v. *McIntosh* also treated the existence of legislation proscribing transactions with Indians in a fashion wholly inconsistent with the reasoning of the court of appeals. *Johnson* rejected the argument that because certain colonial legislatures had enacted laws prohibiting purchases from Indians, Indians' conveyances were valid where there was no such legislation; instead, the Court reasoned that such legislation merely confirmed a universally recognized prohibition against the alienation of Indian title. "[T]he fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy" (21 U.S. (8 Wheat.) at 604). Similarly, the

Nonintercourse Act merely confirmed the authority of the federal sovereign. See also *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 530-532 (2d Cir. 1983).

b. Because federal prerogatives over the alienation of Indian title are rooted in the Constitution and in the federal government's sovereignty, and were merely confirmed by the Nonintercourse Act, the question whether petitioners have stated a claim under the Act appears to us to be of limited importance. To be sure, the question whether petitioners are entitled to assert the rights of the Tribe is crucial. See pages 6-7, *infra*. But the court of appeals' decision does not rest on the conclusion that petitioners were not entitled to do so; indeed, the court of appeals specifically noted that that question would be more appropriately resolved in another proceeding (Pet. App. A13). Since petitioners claim to represent a class consisting of all members and descendents of members of the Tribe, and the Tribe itself is not recognized by the federal government, it is certainly not obvious that petitioners' complaint, on its face, fails to allege that petitioners are entitled to assert the Tribe's Indian title.

3. Although we believe the court of appeals erred, we do not urge this Court to grant review at this time. The proposed settlement of *Gay Head I*, if implemented through an Act of Congress (as is contemplated), will extinguish all claims to the land in issue here that arise from the Gay Head Indians' aboriginal title; that, of course, includes petitioners' claims. Litigation is now pending in the lower courts in which petitioners have sought to enjoin the proposed settlement on the ground that they, not the plaintiffs in *Gay Head I*, legitimately represent the Gay Head Indians. *James* v. *Bellotti*, No. 83-3562-Mc (D. Mass.), on appeal from denial of a preliminary injunction, No. 83-1878 (1st Cir.).

There would be little purpose in the Court's reviewing petitioners' present contentions if petitioners' claims will ultimately be extinguished by legislation. Indeed, if the settlement of *Gay Head I* is upheld, the proper course may be to vacate the decisions below as moot and order petitioners' complaint dismissed. On the other hand, should petitioners' claim to represent the interests of the Gay Head Indians be sustained, the court of appeals' erroneous rejection of their arguments might well warrant review. We accordingly submit that the Court should hold the petition pending the resolution of *James* v. *Bellotti, supra,* or a legislative resolution of the Gay Head claims. We will apprise the Court of pertinent developments when they occur.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1984

DOJ-1984-01

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 14, 1984

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Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20530

MAY 17 PAGE 10

Re: James v. Clark, No. 83-623

Dear Mr. Stevas:

In the Memorandum for the Federal Respondents we filed in this case, we mentioned the then pending appeal in James v. Bellotti, 1st Cir. No. 83-1878, and undertook to apprise the Court when that appeal was decided. Memo. 6-7. We now enclose a copy of the court of appeals' opinion, rendered May 10.

As you will immediately appreciate, the ruling in James v. Bellotti does not finally resolve any issue that seems relevant to the Court's disposition of the pending petition for certiorari. On the other hand, it may be that the "further observations" in the opinion (slip op. 6-9) will hasten legislative consideration of a comprehensive settlement. We shall, of course, continue to advise the Court of any pertinent developments.

Sincerely,

Rex E. Lee
Solicitor General

Enclosure

cc: Robert C. Hahn, Esq.
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United States Court of Appeals
For the First Circuit

No. 83-1878

FRANK B. JAMES, ET AL.,

Plaintiffs, Appellants,

v.

FRANCIS X. BELLOTTI, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, U.S. District Judge]

Before

Bownes, Aldrich and Breyer,

Circuit Judges.

William A. Hahn, with whom Robert C. Hahn, and Hahn & Matkov were on brief, for appellants.

Paul R. Matthews, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Thomas R. Kiley, Assistant Attorney General, Robert J. Muldoon, Jr., and Sherin and Lodgen were on brief, for appellees.

May 10, 1984

BOWNES, Circuit Judge. This is the fourth action in which appellants have appealed adverse determinations from the United States District Court for the District of Massachusetts in connection with the Gay Head Indian land claims. The underlying litigation began in 1974, when the Wampanoag Tribal Council of Gay Head, Inc. (Tribal Council) filed suit against the Town of Gay Head and its selectmen, asserting land claims of the Gay Head Indians on federal constitutional and statutory grounds. The Gay Head Tribe was joined as a party plaintiff, and the Attorney General of Massachusetts and the Gay Head Taxpayers' Association intervened as parties defendant. Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head, No. 74-5826 (D. Mass.) [Wampanoag Tribal Council]. Appellants in the present action, Frank James and Thelma Weissberg, are individual members or descendants of the Gay Head Tribe who, with forty-one others, sought to intervene in Wampanoag Tribal Council in 1981 on the ground that the Tribal Council did not adequately represent their interests. Later, however, they apparently withdrew their motion to intervene.

In the second case, James and Weissberg, along with some one hundred other Gay Head Indians, also sued in the district court, claiming title to the same land involved in Wampanoag Tribal Council on virtually identical federal grounds. The district court granted summary judgment against them, and denied their post-judgment motion to amend their complaint to join the Gay Head Tribe as a party plaintiff. This court affirmed the district court's judgment on appeal, holding that individual Indians lacked standing to sue under

the federal statute, 25 U.S.C. § 1977, that the challenged Massachusetts statutes authorizing alienation of Indian lands were not preempted by the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and that the motion to amend the complaint was properly denied. James v. Watt, 716 F.2d 71 (1st Cir.), petition for cert. filed, 52 U.S.L.W. 3325 (U.S. Oct. 14, 1983) (No. 83-623).

While James v. Watt was pending, James, Weissberg, and the other forty-one would-be intervenors in Wampanoag Tribal Council renewed their motion to intervene, contesting the Tribal Council's authority to represent the Gay Head Tribe and alleging their own standing as individuals to assert tribal claims. Their motion was denied, and they appealed. However, one week after this court's decision in James v. Watt and just prior to scheduled oral argument, appellants withdrew their appeal. Wampanoag Tribal Council, appeal withdrawn, No. 83-1163, (1st Cir. Sept. 1, 1983).

Meanwhile, in September, 1983, the parties in Wampanoag Tribal Council reached a framework settlement agreement providing that the disputed individual and tribal land claims were to be extinguished by special federal legislation and the case dismissed with prejudice. The agreement was drawn up in the form of a "Joint Memorandum of Understanding" (Joint Memo). James and Weissberg opposed the proposed settlement and challenged the validity of the Joint Memo by bringing suit against the Attorney General of Massachusetts, the Tribal Council, the Town of Gay Head, and the Gay Head Taxpayers' Association--four of the five parties to the Wampanoag Tribal Council litigation--in the Probate Court for Suffolk County, Massachusetts.

In addition to an injunction against the signing of the Joint Memo, James and Weissberg requested a declaration that the Tribal Council's "asserted authority to speak for all members-descendants of the Gay Head Tribe" was "illegal and void" and that its intended signing of the Joint Memo "to settle all the Gay Head Tribe's tribal and individual members-descendants [sic] federal land and associated claims" exceeded the terms of its state charter. The Massachusetts court issued a temporary restraining order to prevent the signing of the Joint Memo. The defendants removed the case to federal district court, where the order was dissolved for the following reasons:

> (1) the plaintiffs should not be permitted to challenge the authority of the corporation by taking in essence the first step along the identical road which they sought to travel in James v. Watt and in their effort to intervene in the principal action; (2) there is no likelihood of success on the merits, in the face of the enunciation of principles in the opinion of the Circuit Court of Appeals, and plaintiffs' lack of standing as individuals; (3) and that the harm to defendants is obvious--delay in disposing of this lengthy litigation.

James v. Bellotti, No. 83-3494 (D. Mass. Nov. 14, 1983) [James v. Bellotti I]. James and Weissberg appealed, No. 83-1846 (1st Cir. Nov. 16, 1983). After the Joint Memo was signed on November 19 and 22, 1983, however, they withdrew their appeal (1st Cir. Nov. 22, 1983), and obtained a voluntary dismissal from the district court.

Shortly after commencing the James v. Bellotti I action, James and Weissberg filed the complaint in the present case, which we shall call James v. Bellotti II, in the Superior Court for Suffolk County. The parties are identical to those in James v. Bellotti I, and the

requested relief, viz. an injunction against the signing of the Joint Memo, is the same. The causes of action in James v. Bellotti II, however, are framed entirely with reference to state law: it is alleged that in purporting to represent all Gay Head Indians in the Joint Memo the Tribal Council has misappropriated appellants' names, invaded their statutory privacy interests, and acted fraudulently. The case was removed to the district court, which denied appellants' motion to remand as well as their request for injunctive relief "[f]or precisely the same reasons" set out in James v. Bellotti I.

The denial of an injunction is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), and the refusal to remand to the state court, though not directly appealable by itself, is reviewable in conjunction with the interlocutory appeal. See 1A Moore's Federal Practice ¶ 0.169[2.-3] at 706-07. In this case, the jurisdictional issue is dispositive. Removal from a state court is proper only if the district court has original jurisdiction, 28 U.S.C. § 1441(a), and the only possible ground for removal here is that the case arose under federal law, see 28 U.S.C. § 1331. The existence of a federal question must be determined from the allegations in the complaint, without reference to other documents such as the petition for removal or the answer. Charles D. Bonanno Linen Service, Inc. v. McCarthy, 708 F.2d 1, 3 (1st Cir.), cert. denied, 52 U.S.L.W. 3342 (U.S. Oct. 31, 1983). The elements of a federal claim need not be explicitly and comprehensively recited, and there is nothing to prevent a court from "engag[ing] in a little statutory logic" to deduce elements implicit on the face of the complaint, id. at 4, but the federal

claim must nevertheless be substantial and identifiable. Against the background of protracted and repetitive litigation, it seems likely that appellants have brought this action as part of a larger strategy involving the land claims, and this we will consider in a moment. However, the complaint at least purports to raise three claims under state law--misappropriation of name, invasion of privacy, and fraud--which, conceivably, are independent of the federal claims. The state claims may well lack merit as a matter of state law, but that is another question. We see no adequate basis for federal jurisdiction, and conclude that this action was improvidently removed. At the same time, some further observations are in order:

Although our holding requires that this case be remanded to the state court, we do not mean to suggest that appellants may pursue further litigation without heed to the effects on the district court's jurisdiction in the connected Indian land claim cases. The district court has acquired continuing in rem jurisdiction of the disputed land claims in Wampanoag Tribal Council, and no state court, whether purporting to exercise concurrent jurisdiction in rem, see Penn General Casualty Co. v. Pennsylvania, 294 U.S. 186, 195 (1935); Kline v. Burke Constsruction Co., 260 U.S. 226, 235 (1922), or in personam, see Donovan v. City of Dallas, 377 U.S. 408, 412-13 (1964), may deprive the district court of its exclusive power to adjudicate those land claims. See 1A Moore's Federal Practice ¶ 0.214 at 23644-66. This is merely one aspect of the more general rule that federal and state courts do not interfere with or attempt to restrain each other's

proceedings. Donovan, 377 U.S. at 412. It appears, however, that this is precisely what appellants are attempting to accomplish by seeking a state court injunction against the proposed settlement embodied in the Joint Memo. This they may not do and, if the state court were to seek to enjoin the district court proceedings, or a court-approved settlement thereof, the district court could properly enjoin the state court action.

The federal Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from granting an injunction to stay state court proceedings "except . . . where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Thus, the district court may enjoin appellants from bringing additional suits if one of the statutory exceptions applies and the normal prerequisites for injunctive relief are met. Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286-87 (1970). There is no requirement that an independent jurisdictional basis be shown; the district court's jurisdiction to issue an injunction under the exceptions in section 2283 is ancillary to its jurisdiction in the underlying case. Dugas v. American Surety Co., 300 U.S. 414, 428 (1937); Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84, 90 (5th Cir. 1977), cert. denied, 434 U.S. 832 (1977).

The "necessary in aid of" language in the Anti-Injunction Act has been read as incorporating a historical exception for cases in which a federal court obtains in rem jurisdiction prior to a state-court suit. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 641 (1977)

(plurality opinion). It is not necessarily limited to in rem actions, however, and is meant "to give sufficient flexibility that a federal court, as a court of equity, may, when it has jurisdiction, deal adequately with the situation at hand." 1A Moore's Federal Practice ¶ 0.208a[2] at 2336 (citation omitted). The exception implies that "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Atlantic Coast Line, 398 U.S. at 295; see also United States v. District of Columbia, 654 F.2d 802, 809 n.16 (D.C.), cert. denied sub nom. Prince George's County v. United States, 454 U.S. 1082 (1981).

The words "protect or effectuate" in section 2283 are generally viewed as incorporating the principles of res judicata and collateral estoppel, which come into play only when there is a final judgment or appealable order to be protected or effectuated. International Association of Machinists & Aerospace Workers v. Nix, 512 F.2d 125, 130 (5th Cir. 1975). But see Three J Farms, Inc. v. Plaintiffs' Steering Committee, 659 F.2d 1332, 1335 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982) (judgment approving settlement "predictable if not assured," may support protective injunction though not entered until after injunction); see also Commerce Oil Refining Corp. v. Miner, 303 F.2d 125, 128 (1st Cir. 1962). The proposed settlement of the land claims in Wampanoag Tribal Council is still pending, apparently waiting for congressional and state approval. Nothing prevents the district court from issuing an order provisionally

approving the settlement, which would support a subsequent protective injunction.

It also seems that appellants might be estopped, by their failure to appeal from the denial of their motion to intervene in Wampanoag Tribal Council, from now claiming that they are necessary parties or that their interests were not adequately represented in that case. See Cheyenne River Sioux Tribe of Indians v. United States, 338 F.2d 906, 911 (8th Cir. 1964), cert. denied, 382 U.S.815 (1965). In James v. Watt, this court expressly observed that "the issue at stake--whether plaintiffs here have a right to upset the settlement entered into by the tribe and its other members--is more appropriately before us in [Wampanoag Tribal Council], scheduled to be heard this September." 716 F.2d at 77. By withdrawing their appeal a week after our decision in James v. Watt, and by failing to pursue their appeal in James v. Bellotti I, appellants may well have foreclosed their opportunity to contest the settlement in Wampanoag Tribal Council, with respect not only to the federal claims actually asserted but also to the pendent state claims that could have been raised. See Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939, 945-46 (7th Cir. 1981).

We conclude that the district court has adequate means to prevent interference with its disposition of the Wampanoag Tribal Council case, regardless of the eventual outcome in James v. Bellotti II. Because the present case was improvidently removed, we remand to the district court with instructions to remand the case to the state court under 28 U.S.C. § 1447(c).

Reversed and remanded.

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No. 83-623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANK B. JAMES, *et. al.*,

Petitioners,

v.

JAMES G. WATT, *et. al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTION PRESENTED

Do individual Indian plaintiffs have standing to assert a claim under the Indian Nonintercourse Act?

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STATEMENT OF THE CASE

In 1974, the Wampanoag Tribe of Gay Head (hereinafter "the Tribe") and its duly organized and elected tribal government, the Wampanoag Tribal Council of Gay Head, Inc. (hereinafter "the Tribal Council"), brought suit against the Town of Gay Head and several other Defendants (primarily individual landowners) to recover tribal lands taken from the Tribe in violation of the Indian Nonintercourse Act of 1834, 25 U.S.C. sec. 177. That Act imposes a general restraint against alienation of tribal lands without the consent of Congress.

Since the filing of this suit, the parties have entered into protracted settlement negotiations. These negotiations recently resulted in a

proposed settlement that the Tribe has voted overwhelmingly to accept. The remaining parties have indicated acceptance in principle and it is anticipated that a formal written settlement will be entered into shortly. Upon approval of the Massachusetts General Assembly and the United States Congress the Tribe's claim will be extinguished and the settlement terms implemented.

Petitioners are a minority group of tribal members who disagree with the negotiating policies adopted by the Tribe and the terms of the tribally approved settlement. Having failed to convince the tribal membership of the merits of their position, they now seek to thwart the

Tribe's official action by maintaining this appeal.

ARGUMENT

I. INDIVIDUAL TRIBAL MEMBERS CAN HAVE NO SEPARATE INTEREST IN TRIBAL LAND AND HAVE NO PROTECTABLE INTEREST UNDER THE INDIAN NONINTERCOURSE ACT

Johnson v M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), first defined the nature of "Indian title." Under this doctrine the discovering European sovereign held the ultimate fee but the tribe residing in the area held a continuing "right of occupancy" which could only be extinguished with authority granted from the sovereign. Id. at 573. The right of occupancy was recognized as a tribal right and not an individual right. The Cherokee Trust Funds, 117 U.S. 288, 309 (1886); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894). Johnson v. M'Intosh

also established that Indian title could only be extinguished upon prior approval of the sovereign and after proper conveyance by treaty from the appropriate Indian tribe. 21 U.S. (8 Wheat.) at 574.

The United States, as successor in interest to the first discovering European sovereign, now holds the fee simple title to Indian lands - subject to each tribe's right of occupancy. Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). These early principles remain as the cornerstones of the concept of original Indian title. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

The Indian Nonintercourse Act (herein INA) was meant to statutorily

incorporate and make clear these basic principles of Indian title. (Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 138; see also 25 U.S.C. sec. 177.)

The Petitioner asserts that an individual tribal member can seek the protections afforded under the principles of Indian title and the INA. This position, however, ignores the basic principle that Indian title is tribally held. An individual member of a tribe has no right against the tribe to any specific part of tribal property. Northern Cheyenne Tribe v. Hollowbrest, 425 U.S. 649 (1976); The Cherokee Trust Funds, 177 U.S. 288, 308 (1886). An exception to this rule occurs when some designated interest in tribal land is

specifically set aside for a tribal member by virtue of a treaty, federal statute or under tribal law. It is only under these special circumstances that a member has any divisible interest in tribal property. F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 606. "A member's right to tribal property is no more than prospective and incohate unless federal or tribal law recognizes a more definite right." Id.

Petitioner relies heavily upon Jones v. Meehan, 175 U.S. 1 (1899), to support his contention that the INA applies to conveyances by individual Indians, but this case only applied to lands covered under the exception outlined above. In Jones v. Meehan a

tract of land was set aside for one of the principle signatory chiefs to a treaty with the Red Lake and Pembina bands of Chippewa. It was the title to this specifically designated land, and not to the remaining tribally held land, around which the dispute centered. The opinion did not deal with the ability of individual tribal members to assert the protections of the INA for tribally held lands.

The opinion did note, but did not hold, that the early INA language referring to "any Indian" referred to lands held pursuant to the above exception. There is no indication in the court's opinion, or any other cited source, that individual tribal members had an enforceable right under

the INA.

This case involves a tribal decision to bring an action and settle its claim based upon majority rule. None of the petitioners have a claim nor do any of them allege that they have a claim that falls within any of the above indicated exceptions. As such the Petitioners do not have standing, the ruling below was correctly issued and the Petition must be denied.

II. THE COURT MUST NOT PERMIT A TRIBAL MINORITY TO CONTROL THE DECISION OF THE TRIBE.

The essence of Petitioner's position is that they disagree with the tribal decision to settle a land claim under the INA. There is nothing in the record, and it is not alleged,

that the present tribal governing body is not properly constituted or that the decision to accept the settlement was not properly reached. The Petitioners simply disagree and wish to judicially impose their will on the tribal majority. This they cannot do.

The powers of Indian tribes extend over both their numbers and their territory. United States v. Mazurie, 419 U.S. 544, 557 (1975). This Court has specifically recognized the authority of a tribe to control the conduct of litigation in the face of a minority within the tribe who oppose a tribe's litigation decisions. Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927); F. Cohen, supra at 247. The Congress has expressed support of

tribal control over its own internal matters in the Indian Self-Determination Act, 25 U.S.C. sec. 450.

In this case the Tribe has carefully examined its legal position and has explained that position to its full membership. After careful vote the Tribe overwhelmingly approved the settlement. The Tribe has spoken and this Court must not disturb their determination at the behest of a dissident minority.

CONCLUSION

There is no fundamental disagreement between the circuits regarding the ability of individuals to bring an action under the INA.

There is agreement that individual Indians have no such right. Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979). A close examination of the early cases reveals that the nature of Indian title did not permit such an action unless it lay within narrowly drawn exceptions which are not here applicable.

In addition to this fatal defect, the Petitioners are requesting that this Court usurp the Tribe's right to make decisions that are binding in the full tribal membership. Such interference would fly in the face of this Court's settled practice to respect tribal decision-making absent a congressionally imposed restriction. This the Court must not do.

Respectfully submitted,

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No. 83-623

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK B. JAMES, ET AL.,
Petitioners,

v.

JAMES G. WATT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the Court of Appeals' decision that individual Indians, as opposed to an Indian tribe, could not maintain a centuries old claim to their ancestral lands under either the so-called "Nonintercourse Act" or the Constitution of the United States.

2. Whether this Court should grant a plenary review of the Court of Appeals' procedural decision upholding the denial of a Motion To Amend the Complaint which was not only filed after judgment had issued but also sought to realign the parties, making the defendant Gay Head Tribe a plaintiff, and to reassign the lawyers for the parties, ousting the alleged tribe's counsel from the case.

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STATEMENT OF THE CASE

One hundred and two individuals claiming to be the "James Faction" of the alleged Wampanoag Tribe of Gay Head originally filed this action in the district court claiming the right to possession of all the lands in the town of Gay Head, Massachusetts. They filed as individual Gay Head Indians, as members of the Wampanoag Tribe of Gay Head, and as they represent a class consisting of all members-decendents of the Gay Head Indian Tribe appearing on the Massachusetts Tribal Census of 1849 and 1861. While they claim to be a faction of the alleged Gay Head Tribe, they did not purport to represent the tribe itself and in fact named the Gay Head Tribe and the Wampanoag Tribal Council as defendants.

This rather unorthodox alignment of parties can only be understood by making reference to another Indian land claim suit involving the Town of Gay Head, pending since 1974 before the District Court for the District of Massachusetts, Wampanoag Tribe of Gay Head, et al. v. Town of Gay Head, et al. (C.A. No. 74-5826-McN) (hereinafter, "Gay Head I"). The Amended Complaint in Gay Head I names as plaintiffs the alleged Wampanoag Tribe of Gay Head, and the Wampanoag Tribal Council of Gay Head, proclaimed to be the governing body of the alleged tribe. Gay Head I was brought against the Town of Gay Head and several other defendants, primarily private land owners.

The parties to that action, including the Commonwealth as a defendant-intervenor, engaged in a long and often

difficult negotiation process and have now reached but not yet executed an agreement which, after appropriate action by the Congress and the Massachusetts General Court, will settle the dispute. It is this nascent settlement that prompted the "James Faction" of the alleged tribe to file this action.

These petitioners are dissatisfied with the settlement agreement, yet because they are a minority group within the alleged tribe, they were simply outvoted by a majority of the membership. Not willing to accept this decision of the majority, the minority faction attempted to circumvent the results of the tribal vote by seeking to intervene in the original action as a separate plaintiff. They withdrew the application, however, after it was opposed by all the parties. These dissident

individuals then filed this separate action seeking relief pursuant to the Nonintercourse Act, 25 U.S.C. §177, the United States Constitution, and an assortment of federal statutes. After receiving motions to dismiss from each named defendant, the District Judge dismissed the complaint on December 18, 1982. The basis for the dismissal was that only Indian tribes, and not simply individual Indians, could raise a claim under the Nonintercourse Act.

Following dismissal, these petitioners moved to cure the obvious defects in their complaint by adding the Gay Head Tribe, the Wampanoag Nation, and Ellsworth Oakley as named plaintiffs. They took this action even though the alleged tribe was already represented by counsel and involved as a named defendant. The

district judge promptly denied the motion.

On January 14, 1983, the petitioners filed a Notice of Appeal. The First Circuit Court of Appeals issued its Opinion on August 24, 1983, and affirmed the decision of the district court. The petitioners then filed this petition for writ of certiorari.[1/]

1/ The petitioners made two further attempts to frustrate the settlement process. First, they sought to renew their Motion to Intervene in Gay Head I. Once again, it was opposed by all the parties. The district judge denied the application on February 24, 1983. The "James Faction" filed a Notice of Appeal from that denial and briefs were actually filed with the Court of Appeals, but the appeal was ultimately withdrawn.

Second, they filed an action in the Massachusetts Probate Court contending that as a state chartered corporation, the plaintiffs in Gay Head I would be acting ultra vires if they signed the settlement agreement. That case, as of this writing, has been removed to the United States District Court handling the Gay Head I matter.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not raise any special or important issues that warrant certiorari review. The petition raises no important questions of federal law. It does not present for review a decision which conflicts with any decision of this Court or any other federal court of appeals. Finally, and most important, the First Circuit Court of Appeals was correct in dismissing the appeal. The law is clear that the land claim brought by these individuals, may only be brought by an Indian Tribe; otherwise the claim must fail. Application of this well-settled premise was especially appropriate in the instant case since the alleged tribe had already instituted litigation, by now nine years old, on behalf of all its members, including

these petitioners. Finally, petitioners' attempt to amend their complaint after the judgment had issued was untimely and improper and properly dismissed.

I. The First Circuit Properly Ruled That Individual Indians Have No Standing To Bring A Claim Under The Nonintercourse Act.

The petitioners sought first and foremost to establish their rights under the so-called "Nonintercourse Act", 25 U.S.C. §177, which expressly speaks of conveyances from "any Indian Nation or Tribe of Indians," but not conveyances from individual Indians.[2/] There is

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2/ The Nonintercourse Act, 25 U.S.C. §177 provides in pertinent part:

> No purchase, grant, lease, or other conveyances of lands or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. (emphasis supplied).

an unbroken line of cases in the First Circuit interpreting this statute and clearly establishing the principle that while tribes and those legitimately representing tribes have the right to maintain a claim for relief pursuant to 25 U.S.C. §177, individuals, tribal members or descendants of Indians do not. See Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1978), cert. denied, 444 U.S. 866 (1979); see also Mashpee Tribe v. Watt, 542 F.Supp. 797 (D.Mass. 1982), aff'd, 707 F.2d 23 (1st Cir. 1983); Oneida Indian Nation v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F.Supp. 798 (D.R.I. 1976). The cases properly interpret the statute first by reference to its literal terms and second its

legislative history.[3] Both demonstrate that only tribes may bring claims under the Nonintercourse Act. Because the petitioners brought their action as individual Gay Head Indians, and in fact named the tribe as a defendant, the First Circuit quite correctly followed that line of cases. Petitioners have not and can not cite any contervailing authority.

3/ The Nonintercourse Act has historical antecedents dating back to 1790. In certain of its earliest formulations, the terms of the statutes precursors included references to Indians. More than one hundred years ago, however, Congress deleted any protection previously afforded individual Indians by the earlier forms of the Act. The 1834 Act limited the applicability of its predecessor, the 1802 Trade and Intercourse Act (Act of March 30, 1802, Ch. 13, Stat. 139) which had invalidated similar conveyances "from any Indian, or Nation, or Tribe of Indians."

The Attorney General does not presume that in this brief submission he can present the proposition better than the above cited opinions. Consequently he merely suggests that this case, particularly in light of its unique procedural posture, does not present an appropriate vehicle to review this long, unbroken line of precedents.

II. The First Circuit Properly Ruled That Petitioners' Complaint Stated No Cause of Action Independent of the Nonintercourse Act.

The petitioners next contend that standing to maintain their action was found under federal Indian common law and direct constitutional authority. The First Circuit disagreed.

The primary source of federal authority to regulate the disposition of Indian lands is found in the Commerce Clause, U.S. Const., Art. 1, Sec. 8, cl.

3, which provides in pertinent part that: "The congress shall have the power ... to regulate Commerce ... with the Indian Tribes." Within a year of receiving this full and complete power to regulate commerce with the Indian Tribes, the very first Congress exercised its perogative by enacting the Nonintercourse Act. It is currently embodied in 25 U.S.C. §177. As noted above, the current version of the Nonintercourse Act applies only to "conveyances of lands ... from any Indian nation or tribe of Indians"; all non-tribal references have been deleted from the act and only tribes and those representing tribes have standing under its provisions. Thus if there ever has been a federal Indian common law pertaining to the alienation of lands, it has long since been displaced by

the Nonintercourse Act. Since Congress has articulated that as a matter of federal law it is only Indian tribes and those representing tribes who may maintain an action under the Nonintercourse Act, it is the courts' duty to respect the will of Congress. See Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 96 (1981); Milwaukee v. Illinois, 451 U.S. 304, 317 (1981). Therefore, contrary to the petitioners' assertion, the First Circuit did not ignore the notion of federal supremacy over Indian lands and land claims; rather the First Circuit embraced it wholeheartedly and ruled accordingly.

Moreover, the petitioners' claim based on derivative rights, individual rights in tribal property, have no

viability in the absence of a tribal claim. An individual Indian's rights or interests in tribal property are measured wholly in relation to the nature and extent of the tribe's right. United States v. Chase, 245 U.S. 89 (1917). This necessarily implies that either a tribe already exists or that the petitioners represent an alleged tribe and advanced tribal claims. Since petitioners advance only individual claims, and the tribal claim is restricted to the preexisting Gay Head I litigation, their discussion of individual rights in tribal property is of no moment and cannot support their claim of standing.

Finally, the First Circuit affirmed without discussion the district court's conclusion that the Supremacy Clause

does not support the petitioners' cause of action. The claim was so specious that it did not warrant discussion. The Supremacy Clause is not a source of any federal rights; instead its gives priority to federal rights whenever they conflict with state law. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979). Since petitioners did not state a claim under the Noninter-course Act, the Supremacy Clause simply does not apply.

III. The First Circuit Was Correct In Upholding The District Court's Denial Of Petitioners' Post- Judgment Motion To Amend.

In disposing of the post-judgment motion to amend, the lower courts were also guided by well-established principles of law which need not be reviewed by this Court.

Petitioners' attempt to amend their complaint after judgment had issued against them was not justified under any standard of liberal pleading. First, the motion was clearly not timely filed. A motion to amend should ordinarily be made prior to the issuance of judgment, otherwise the notion of finality of judgments would ring hollow. This is made evident in the instant case, where the petitioners sought to amend their complaint solely to circumvent the judgment just issued against them. Second, the petitioners sought to amend their complaint by realigning the parties to the action and adding the Wampanoag Tribe of Gay Head as plaintiff, even though (1) they were already a named defendant, (2) they were already represented by counsel and had vigorously

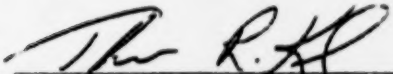
challenged the petitioners' authority to maintain the action, and (3) they were already party plaintiffs in an ongoing suit making similar claims. There is no justification for such a motion. Petitioners' post-judgment motion to amend was appropriately denied.

CONCLUSION

Because it presents no important, unsettled questions of law and because the lower courts disposed of this action in accordance with well-established precedents, the petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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DATED: November 14, 1983

UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
DEC 16 198
ALEXANDER L. STEVAS
CLERK

FRANK B. JAMES, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	NO. 83-623
	)	
JAMES G. WATT, et al.,	)	
	)	
Respondents.	)	

OPPOSITION TO PETITIONERS' MOTION
TO STRIKE APPEARANCES

The Wampanoag Tribal Council of Gay Head, Inc., Gladys Widdiss and Donald Widdiss are parties to the above entitled action and are being represented by the Native American Rights Fund. Through their counsel, these parties filed a Brief in Opposition to the Petition for Writ of Certiorari herein. On December 9, 1983, a copy of a pleading entitled "Petitioners' Motion to Strike Appearances of Henry J. Sockbeson, Arlinda Locklear and Native American Rights Fund for Gay Head Tribe" was received by respondents. This motion seeks to have respondent's Brief in Oppostion to Petition for a Writ of Certiorari stricken from the record. For the reasons set forth below, respondents oppose the motion.

1. The Native American Rights Fund represents the above listed parties to this action and, as such, is entitled to file a response to the Petition for Certiorari as a matter of right. Supreme Court Rules 19 and 20. Having named these parties as defendants in their action, the petitioners must not now be permitted to silence them simply because petitioners do not approve of the position respondents have taken or of their choice of counsel.

2. The crux of petitioners' motion seems to be that a tribe may not create a state chartered corporation in order to, among other things, pursue a tribal land claim. This argument, however, has been consistently rejected by lower courts. See Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., et.al., 418 F. Supp. 798, 807-08 (1976) (Narragansett Tribe, incorporated at the time under Rhode Island law); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1235-36 (4th Cir. 1974) (Eastern Band of Cherokee, organized under a North Carolina corporate charter).

3. Petitioners attempt to avoid this difficulty by relying upon a quotation from Cohen's Handbook of Federal Indian Law (1971 UNM ed.) which states that individuals in a tribe have rights of participation that are "similar in some respects" to those of an individual shareholder in a corporation. Cohen, supra at 183. At no point, however, does Cohen suggest that suing to enforce tribal property rights is one of those similarities or that an individual may assert such rights in a manner contrary to tribal decisionmaking.

4. Petitioners cite Short v. United States, 661 F.2d 150, 155 (Ct.Cl. 1981), in support of their position that individuals may assert tribal rights. However, that case arose in the context of a tribe that had no functioning tribal government. Short did not hold that individual tribal members could bring a competing action designed to impede the ability of the tribe's governing body to pursue a tribal land claim under the Indian Trade and Intercourse Act, Ch. 33, 1 Stat. 137, now codified at 25 U.S.C. sec. 177. To the contrary, it has been held by this Court that a dissident minority may not

affect tribal decisions regarding the conduct of tribal litigation. Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927).

5. It is true that the Wampanoag Tribe of Gay Head is not currently a federally recognized tribe. This fact, standing alone, does not impair the tribe's ability to pursue a cause of action under the Indian Trade and Intercourse Act. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1970).

6. Here, as shown by the record below, respondent Wampanoag Tribe of Gay Head has filed an action in both its tribal capacity and as a state chartered corportaion. This approach is not new or novel and has proven successful in the past. Narragansett, supra; see also 25 U.S.C. sec. 1701. The individual tribal members presently before this Court disagree with the tribe's litigation strategy and have attempted to assert their own theory of the case in a competing lawsuit. Ultimately, it will be Congress who must decide the manner in which the tribe's claim will be settled and it should be left to that body to decide how to accomplish that end.

Respectfully submitted,

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DONALD WIDDISS,

By their attorneys,

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MOTION FILED
DEC 13 1983

No. 83-623

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANK B. JAMES, et al.

Petitioners

v.

JAMES G. WATT, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, MOHAWK NATION, NATIONAL LAWYERS GUILD, ONONDAGA NATION, UNITED AMERICAN INDIANS OF NEW ENGLAND IN SUPPORT OF GRANTING THE WRIT

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December 13, 1983

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIE

The Center for Constitutional Rights and other amici hereby respectfully move, pursuant to Rules 36.1 and 42(3) of the Court's Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioner's effort to obtain review of important procedural and

substantive questions concerning the extent to which the Constitution and federal common law protect Indian land title.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amici curiae are Indian nations, Indian rights and civil liberties organizations, which have been involved in issues of the type presented in this case or which believe that denial of due process and Constitutional protection to Indians ultimately affects the rights of all people in the United States and that equitable application of the law is essential to protecting the rights of all people.

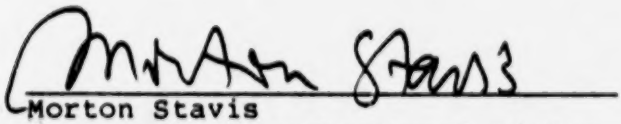
The proposed brief of amici addresses the need for granting the writ from a

broad perspective, beyond that presented by the parties. The proposed brief discusses the national significance of the issues presented and the need for this Court to affirm basic protections historically guaranteed to Indians by the Constitution and federal common law.

Amici believe that the courts below have ruled against petitioners on the basis of ungrounded and inconsistent standards that are wholly and grossly outside the framework fashioned by this Court for litigating Indian land title. Amici believe that the erroneous judgments below should be reversed, to protect Indian land title throughout the country.

Amici have requested the consent of the parties to appear. The petitioners and respondent Commonwealth of Massachusetts have granted such consent,

but to date other respondents have not. For the foregoing reasons, amici respectfully move this Court for leave to file the attached brief amici curiae in sup-



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Mohawk Nation

National Lawyers Guild

Onondaga Nation

United American Indians of New England

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December 13, 1983

STATEMENTS OF INTEREST OF AMICI CURIAE

Center for Constitutional Rights

The Center for Constitutional Rights was born out of the southern civil rights movement of the 1960's. Since that time it has developed legal theories in support of constitutional rights in many areas. In June, 1962, CCR joined as amicus curiae in Hopi Indian Tribe v. Block to support religious rights in the San Francisco Peaks. Other cases have included the Wounded Knee defendants and Leonard Peltier, South Dakota v. Means, and other lawsuits.

Indian Law Resource Center

The Indian Law Resource Center assists Native Americans in protecting their legal rights, human rights, cultures and religions through a program of research, public education and legal assistance.

Mohawk and Onondaga Nations

The Mohawk and Onondaga Nations, located within the State of New York, are recognized nations of Indians who believe their interests in their land are adversely affected by the decision of the First Circuit Court of Appeals in this case, and who wish to appear as amici in support of granting the petition for certiorari.

National Lawyers Guild

The National Lawyers Guild is a nationwide membership organization of 7,000 lawyers, legal workers, law students and jailhouse lawyers with 105 chapters throughout the United States. Since its founding in 1937, the Lawyers Guild has been dedicated to seeking social equality, freedom to dissent and human rights. The Guild has regularly appeared as amicus curiae in defense of

civil liberties and treaty rights of Native people. It is in that context that the Guild supports petitioners in this case.

United American Indians of New England

United American Indians of New England is a regional organization formed to promote traditional native cultures and to support Native American concerns among the public. In this context, UAINE seeks acknowledgement and protection of Indian lands.

INTRODUCTION: REVIEW OF LOWER COURT DECISION IS APPROPRIATE AND NECESSARY DESPITE EXISTENCE OF COMPETING LAWSUITS

Amici take no position regarding the existence of competing lawsuits regarding land title within the Gay Head tribe, except to assert that such competition is in itself not a proper basis upon which to premise the grant or denial of review of an erroneous lower court decision, especially where such decision may affect the rights of Indian nations not party to this litigation.

Amici seek leave to appear at this stage of the proceedings in this case because we believe that the decision below presents a threat to Indian land title throughout the nation, and that a dangerous precedent will have been set if the decision below is not reversed.

Amici believe that protection of Indian land title is integral to a

longstanding national policy that recognizes the unique status of the indigenous population of this continent. Amici believe that protection of Indian title is inextricably bound together with a continuing federal obligation to protect Indian cultures, institutions, and ways of life, expressed in a multitude of statutes and decisions.

Doctrines of standing and "balancing of interests" have been inappropriately applied by the lower courts to deprive Indian petitioners of their right to present federal common law and Constitutional claims whose significance has long been recognized by this Court.

STATEMENT OF THE CASE

Petitioners have existed on land they now inhabit and claim since time immemorial, and certainly since the time of first European contact with this con-

tinent.

Petitioners' attempt to litigate federal common law and Constitutional claims to their land was dismissed for lack of standing, and their move to cure the standing problem by amendment of their complaint was denied. Frank B. James, et al. v. James G. Watt, et al., D.C. Mass., Civ. No. 81-3204 (1982).

The First Circuit affirmed dismissal of Petitioners' complaint, holding that unilateral state action extinguishing Indian land title is to be tested for its legality by a simple "balancing of interests" approach. Frank B. James, et al. v. James G. Watt, et al., 716 F.2d 71 (1983).

ARGUMENT

I. THE DECISION BELOW CREATES A TOTALLY INAPPROPRIATE AND FUNDAMENTALLY INCORRECT STANDARD TO PERMIT THE EXTINGUISHMENT OF INDIAN TITLE BY UNILATERAL STATE ACTION

The First Circuit's decision which upholds extinguishment of Indian land title by unilateral state action applies reasoning wholly inappropriate for the subject matter and never applied before in any federal court. The use of a "balancing of interests" test which federal courts have fashioned in determining whether or not a state can exercise jurisdiction on Indian lands has never before been applied to the issue of federal protection of Indian land titles. It is totally an inappropriate use of the test and there is absolutely no authority for its use. Were such a decision to stand, chaos in the law of Indian jurisprudence would result.

Petitioners federal Constitutional and common law claims to Indian title were denied by the District Court without reference to opinions of this court

requiring a contrary result. Regarding the central issue of federal power over Indian lands derived from the Indian Commerce Clause, the District Court's entire reasoning, without citation of any authority, was: "The Commerce Clause, U.S. Const. art. I, sec. 8, cl. 3, standing alone does not provide a cause of action such as plaintiffs assert here."

The First Circuit decision affirming the District Court's dismissal is based on a cursory review of academic treatises, on an unjustified importation of Interstate Commerce Clause principles, and on an extended hypothetical discussion purporting to apply an "interest balancing" test to Indian land title. Nowhere in any of the authorities cited by the Circuit Court is there presented any suggestion that the federal protec-

tion of Indian title to land from state interference is subject to an "interest balancing" approach. None of the cases cited by the First Circuit in support of its opinion go to the central issue of Indian title to land.

The Circuit Court's hypothetical reasoning purporting to "balance interests" regarding Indian land title begins with an assumption that is wholly out of line with controlling authority:

> . . . imagine the circumstances in which plaintiffs' preemption argument would be strongest--namely if Congress had never enacted the (Indian Nonintercourse Act). 716 F.2d at 74.

This Court has clearly and unambiguously stated, in Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974) that:

> . . . a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941))

In light of this principle, the existence of the Nonintercourse Act is irrelevant to a claim of Indian title under federal Constitutional and common law.[1] The incongruity of the First Circuit's reasoning is further demonstrated when it cites the 1834 Nonintercourse Act for the proposition that the settled policy enunciated in this Court's 1916 decision, United States v. Nice, 241 U.S. 591, was "modified . . . (by) Congress consciously"! 716 F.2d at .

This Court has never departed from its original assertion of federal preemption over the question of Indian title to

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[1] It is surely significant in this regard that the earliest formulation of federal protection of Indian title, Johnson v. M'Intosh, 8 Wheat. 543 (1823), Worcester v. Georgia, 6 Pet. 515 (1832), were decided well after passage of the first Nonintercourse Act and yet did not rely in the least on the Act as a source of preeminent federal power, regarding them rather as expressions of this power.

land enunciated by Chief Justice Marshall. The reaffirmation of that basic doctrine in Oneida, supra, is tossed aside by the First Circuit as "dicta in later cases." 716 F.2d at 73. In fact, this Court is and always has been explicit about Indian title as a federal matter:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the orginal States . . . but this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. 414 U.S. at 670.
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> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. (citations omitted) Id., at 668

(quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941)).

The First Circuit's failure and refusal to acknowledge this "rudimentary proposition" that Indian title is a matter of federal law and can be extinguished only with federal consent is an astounding and blatant disregard of controlling authority unprecedented in the history of federal Indian law.[2] The First Circuit refers to these basic and controlling principles of federal preemption in matters of Indian title as mere "arguments" which "one could note" in a hypothetical discussion which it

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[2] Except for Andrew Jackson's infamous remark regarding this Court's decision in Worcester v. Georgia, supra, that "John Marshall has made his decision, now let him enforce it!" Horace Greeley, The American Conflict, Vol. I, p. 106 (1864).

concludes by saying it cannot "pretend to know who would have won this hypothetical argument." 716 F.2d at 75. The Circuit Court gives no justification for this disregard of Oneida less than ten years after the decision, other than by citation of an academic article "exploring difficulties of interpreting congressional failure to legislate." Id., at 74.

This Court should not permit such flagrant and flippant departures from established standards.

II. THE DECISION BELOW IS IN CONFLICT WITH RECENT DECISIONS IN THE FOURTH AND SECOND CIRCUITS

The First Circuit decision in this case is completely contrary to recent decisions in the Fourth and Second Circuits, Catawba Indian Tribe of South Carolina v. State of South Carolina, Docket No. 82-1671 (4th Cir., October 11,

1983), and Oneida Indian Nation of New York v. County of Oneida, Docket No's. 82-7436, 82-7486, 82-7526 (2d Cir., September 29, 1983). A review of Catawba and Oneida underscores the absurdity of the First Circuit's reasoning.

In Catawba, the Fourth Circuit reversed a District Court decision which had granted the state's motion for summary judgment (unreported decision, D.C. S.C., Columbia Div., Civ. No. 80-2050, June 14, 1982). The Circuit Court held that the Catawba Termination Act, 25 U.S.C. §§931, et seq. (1959), did not preclude plaintiff's suit to recover lands under the Nonintercourse Act. The court stated that the termination act had no effect on plaintiff's land claims, neither extinguishing nor preserving them. The Fourth Circuit specifically held that the termination act did not

make state law applicable to the tribe, nor did it end tribal existence.

Catawba acknowledges that Indian land rights are so fundamentally important in our federal scheme that they can be terminated only by explicit Congressional intention, which was not present in the 1959 act.

The recent Second Circuit decision of Oneida Indian Nation of New York State, et al., v. The County of Oneida, New York, et al., also recognizes that federal common law protects Indian title. Holding that the Nonintercourse Act merely augmented already existing federal common law, the court affirmed the District Court's finding of a private right of action to enforce the Act. In upholding this right, the Second Circuit stated:

> There is no evidence to suggest that Congress intended to deny common

> law remedies to the Indians. In an analogous area involving congressional extinguishinment of Indian land titles, the Supreme Court has stated that evidence of such congressional intent should be "plain and unambiguous," and would 'not be lightly implied in view of the avowed solicitude of the Federal Government for the Welfare of its Indian wards.' U.S. v. Santa Fe Pacific, 314 U.S. at 346, 354. Neither should we imply a congressional intention to extinguish the Indians' common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire. Accordingly, we hold that the district court had jurisdiction to grant relief under federal common law. Id., Slip Opinion, page 11.

Upon comparison of these two decisions from other circuits with the First Circuit decision in the instant case, the inequities become all too apparent. In Catawba and Oneida settled law is closely followed, whereas in James v. Watt, the heretofore acknowledged rudimentary propositions are completely ignored in order to deny the Indian litigants the opportunity to fully litigate their claims.

This Court must resolve this conflict between Circuits in favor of the long-standing policy of solicitude toward Indian litigants.

III. PETITIONER'S CONSTITUTIONAL AND FEDERAL COMMON LAW CLAIMS PRESENT QUESTIONS OF RECOGNIZED SIGNIFICANCE TO THIS COURT

Petitioners present the most fundamental approach to matters of Indian land title since the great Cherokee Nation appeals to this Court 150 years ago. Petitioners' claims antedate the Revolution and the Constitution. They go to the heart of federal jurisdiction over Indian land cases, rooted in basic principles of international law and sovereignty. As the United States Department of Justice stated in its amicus brief to this court in State of Connecticut v. Mohegan Tribe, 638 F.2d 612 (2d Cir., 1980), cert. denied. 452 U.S. 968 (1981):

> . . . quite independently of any statutory restraints, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and any such attempted transaction is void as a matter of law, without reference to the Nonintercourse Acts. Thus, in this case, the respondent pleaded the ineffectiveness of any land sales under the Constitution, and no decision here of the statutory issue can affect that fundamental objection, not yet addressed by the courts below. Id., at 4-5.

This Court has repeatedly applied these principles, most recently in Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974), wherein was stated:

> The rudimentary propositions that Indian title is a matter of extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States . . . but this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. Id., at 670.

* * *

> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. (citations omitted) Id., at 668 (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941)).

In light of these oft-repeated principles, the summary disposition by the District Court of Petitioners' claim under the Indian Commerce Clause ("The Commerce Clause . . . is simply the basis for the Nonintercourse Act, under which these individual plaintiffs cannot state a claim.") lacks any justifiable foundation, and the First Circuit's affirmance of this disposition, relying on an academic treatise and hypothetical analogies, is grossly out of line with this Court's holdings.

The line of reasoning introduced

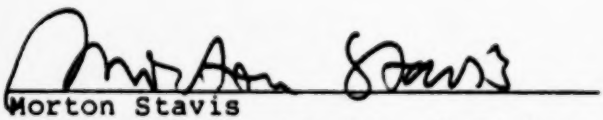
through the First Circuit's hypothetical discussions and speculations concerning the purpose of Massachusetts statutes extinguishing Indian title, and purporting to "balance" this purpose with other factors is patently contradictory to basic federal Indian law. The Circuit Court's assertion of a "valid (state) interest in maintaining the stability of land transactions entered into according to its laws, in treating all of its citizens equally, and providing the same property rights to all of its citizens," 716 F.2d at 76, flies in the face of the entire purpose of the federal restriction on alienation of Indian land. The "legal disability" inherent in the concept of "Indian wardship" is designed precisely to prevent this land from being conveyed, to keep Indian land from being available for fee simple conveyance as ordinary

real estate. This Court long ago recognized the fraud, overreaching, and speculation that has historically occurred in relation to the sale and purchase of Indian land. "Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886).

CONCLUSION

The First Circuit opinion affirming dismissal of Petitioners' claims to Indian title in land at Gay Head is so dangerously and grotesquely out of line with settled law that this Court must grant the writ of certiorari to review and reverse it. Should the writ not be granted, and the opinion stand, the result would be a serious confusion and erosion of long-standing and recently

reaffirmed principles of federal preeminence in matters of Indian land title. Indian land throughout the country would be exposed to attack on the basis of a new standard totally inappropriate and fundamentally incorrect.



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December 13, 1983